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STIPULATION.

Filed May 7, 1953.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION.

No. 708 Criminal.

UNITED STATES OF AMERICA,
Plaintiff,

versus

O. L. SHANNON,
Defendant.

It is hereby agreed and stipulated by and between O. L. Shannon defendant in the above-entitled and numbered cause, and appellant in the cause of O. L. Shannon, appellant, v. United States of America, appellee, No. 14,416 in the United States Court of Appeals for the Fifth Circuit, and United States of America, acting by and through their respective attorneys of record as follows:

1.

That Government's exhibits 1, 2 and 3 introduced in evidence at the trial of said cause in the United States District Court were inadvertently and by error and accident omitted from the record which was transmitted by the Clerk of the trial Court to the United States Court of Appeals and said exhibits are material to both parties.

2.

That for the purpose of correcting the said omission from the record the Clerk of the United States District Court for the Northern District of Texas, Lubbock Divi-

sion, be and is hereby directed to prepare and certify a supplemental record consisting of the Government's exhibits 1, 2 and 3 above mentioned and transmit the same to the Clerk of the United States Court of Appeals for the Fifth Circuit.

Dated at Lubbock, Texas, the 26th day of May, 1953.

KENNETH BAWLIN,
Attorney for O. L. Shannon, Defendant in the trial Court and appellant in the United States Court of Appeals.

A. W. CHRISTIAN,
(A. W. Christian),
Assistant United States Attorney, Attorney for United States of America.

FORM C
REVISED 8-1-46

UNITED STATES DEPARTMENT OF AGRICULTURE
COMMODITY CREDIT CORPORATION

UNIFORM GRAIN STORAGE AGREEMENT

A74-6-CCC-8[illegible]
Code 7475

JUN 2 [illegible]

1. This Agreement, made and entered into this First day of June, 1949, by and between Commodity Credit Corporation, hereinafter referred to as "Commodity", and O. L. Shannon, with principal place of business at Sudan, Texas, hereinafter referred to as the "warehouseman";

WITNESSETH:

2. WHEREAS, the warehouseman owns or operates an elevator or warehouse located at Sudan, [illegible] Street, on the F. R. St. Railroad, in the city of Sudan, County of Lamb, and the State of Texas, and known as Shannon Elevator 2, hereinafter referred to as the "warehouse"; and

3. WHEREAS, Commodity desires that the facilities of the warehouse be made available with respect to grain as defined in this agreement, owned by, or in the possession of, Commodity or any other agency of the United States under the general supervision of the Secretary of Agriculture, or in the possession of any lending agency in connection with a loan made available by Commodity, or, as of the date of deposit, grain which is deposited in the warehouse by a producer, and later becomes security for a loan made, or made available, by Commodity (such grain being hereinafter referred to as "the grain" or as "grain subject to the terms of this agreement");

4. NOW, THEREFORE, in consideration of the covenants and agreements herein contained, and for other good and valuable considerations, the parties hereto covenant and agree as follows:

5. The warehouseman shall receive, store (up to the capacity made available by him), insure (except as hereinafter provided), condition, and load out the grain in accordance with the directions of Commodity, at the applicable rates specified in the Schedule of Rates attached hereto.

6. Upon receipt by the warehouseman of the grain, or when grain in store is purchased by Commodity, the warehouseman shall issue, in such form as meets the approval of Commodity, either negotiable or nonnegotiable, warehouse receipts as Commodity may request, representing the grain and shall indicate on such receipts the method by which the grain was received by him, accompanied by inbound weight certificates, when available, and, when requested by Commodity or the owner of the grain, inspection certificates describing the test weight and special grading factors, if any, and specifying the percentage of damaged kernels, foreign material, moisture content, and grain of other classes, and protein certificates or documents describing the quality of the grain, provided that with the consent of the depositor, a protein certificate representing wheat received by wagon, truck or less than carload lots may be issued on the basis of the station average for protein.

7. The warehouseman shall keep all the grain which is stored in the warehouse in store in the warehouse described in this agreement, and shall at all times maintain in the warehouse a stock of grain of the class, grade, and quality of the grain described in the outstanding warehouse receipts and accompanying certificates or documents, sufficient to deliver from the warehouse the grain described in such receipts and accompanying certificates or documents, and to the extent that facilities of the warehouse are made available, he shall store all corn stored hereunder, and such other of the grain as Commodity may request, in special bins, according to class and grade, so as to preserve its identity.

8. The warehouseman shall load out or deliver to the holder of any warehouse receipt grain of the same class, grade, quantity and quality, or better, and, in the case of wheat, of a protein content within three-tenths of one percent, as that described by the surrendered warehouse receipt and accompanying certificates or documents, and sheet of country-run quality equal to that received into the warehouse, except that, in the case of grain which was received by wagon, truck, or less than carload lots, the quality may be the average of the quality described in the surrendered warehouse receipts and accompanying documents or certificates. At locations where no official grading services or protein laboratories are available, the warehouseman may load out or deliver wheat of any merchantable grade which is fairly representative of the wheat described in the warehouse receipts, provided, however, that such wheat shall be subject to discounts as provided in section 11. For the purposes of this section and section 11, the grade, quality, and protein content of wheat represented by a group of warehouse receipts included in one shipping order shall be the weighted average of the grade, quality, and protein content of the wheat represented by such group of warehouse receipts. Wheat not meeting the requirements of this section may be rejected, and if accepted shall be subject to the discounts provided in section 11.

9. Without in any way limiting his obligation under the other provisions of this agreement, the warehouseman shall insure, and at all times keep insured, in his own name, all the grain for the full market value thereof, against loss or damage by fire, lightning, inherent explosion, windstorm, cyclone, or tornado, and, in the event of any loss or damage to the grain, or to the warehouse, whether or not such loss was insured against, he shall immediately notify Commodity and the holders of the warehouse receipts representing such grain, as the holders appear on the records of the warehouseman, and he shall at his own expense promptly take the steps necessary to collect any moneys which may be due as indemnity for such loss or damage, including the bringing of suit, and, as soon as collected, shall pay to the holders of such warehouse receipts such moneys as may be collected for the loss or damage. In the event the warehouseman insures against hazards to the grain not specified herein, such insurance shall inure to the benefit of the holders of the warehouse receipts. In the event of loss or damage

to the grain, all charges provided for by this agreement with respect to the grain so lost or damaged shall be paid until and cease as of the date of such loss or damage.

10. The warehouseman shall observe the carriers' tariff and loading requirements, and shall indemnify Commodity against minimum weight penalties and demurrage, except those that are incurred due to circumstances beyond his control, and he shall assume all inbound switching charges which are recoverable or which are absorbed by the carrier on outbound shipments.

11. In the event that any of the grain which is loaded out by the warehouseman is found - on the basis of official weights and grades at the point of storage, or, if official weights and grades are not available at such point, on the basis of official weights and grades at destination or at the inspection point shown on the shipping order furnished the warehouseman, which unless otherwise agreed shall be the customary location, on the route of shipment, of an inspector licensed under the United States Grain Standards Act - to be of a class, grade, quantity or quality lower than that described by warehouse receipts, and accompanying certificates or documents, surrendered by Commodity, the warehouseman shall indemnify Commodity in an amount equal to the difference between the value of the grain loaded out and the value of the grain described by the warehouse receipts and accompanying certificates or documents, on the basis of cash prices current at the terminal market customarily applicable to grain stored in the warehouse at the time when the grain was shipped. In the case of wheat received by the warehouseman by rail or barge and in the case of all of the grain other than wheat, settlement shall be made on the basis of each shipping order. In the case of wheat received by wagon or truck, settlement shall be made on the basis of each year's crop stored at the warehouse, Commodity to issue shipping orders based on the weighted average of such year's crop, and debits and credits to be established accordingly on each shipping order, the debits and credits to be set off against each other, and final cash settlement made after the date the last grain of such year's crop is loaded out or sold or otherwise disposed of, any credits not set off against debits of such crop year to be dropped and not carried forward.

12. Unless the warehouseman operated the warehouse under a license issued by the Secretary of Agriculture under the United States Warehouse Act, he shall comply with such conditions as may be prescribed by Commodity prior to the execution of this agreement. The warehouseman shall furnish Commodity such bond or bonds as may from time to time be required by Commodity, and, at any time during business hours, he shall permit Commodity to inspect the warehouse and its equipment, inspect, measure or take inventories of grain stored therein, and examine the stock records, receipt books, insurance policies, and other documents pertaining to such grain.

13. Upon the request of Commodity or the owner of the grain, the warehouseman shall furnish a sample thereof, agreed by the warehouseman and the owner of the grain to be a representative sample.

14. Commodity shall cause to be paid, with respect to the grain owned by Commodity, upon the presentation of a proper invoice, all accrued charges at the applicable rates specified in the Schedule of Rates attached hereto, as of June 30, September 30, December 31, and March 31, of each year (unless the warehouse receipts are surrendered prior to any such date, in which case payments shall be made as of such surrender date), and Commodity shall cause to be paid with respect to the grain in the possession of, but not owned by Commodity, or in the possession of any lending agency in connection with any loan made or made available by Commodity, upon presentation of a proper invoice to the holder of the warehouse receipts representing such grain, all accrued charges at the applicable rates specified in the Schedule of Rates, as of the applicable renewal date of this agreement, provided, however, that at the option of Commodity, a semi-annual payment of warehouse charges not to exceed one-half of the annual storage rate, plus receiving charges for the grain which has been in store for at least six months after the annual renewal date of the agreement, may be made for the grain in the possession of, but not owned by Commodity, or in the possession of any lending agency, in connection with a loan made or made available by Commodity.

15. The Director of the Grain Branch, Production and Marketing Administration, the Directors of the Chicago, Kansas City, Minneapolis, and Portland offices of said Grain Branch, or the duly authorized representatives of any of such officials, or any other duly authorized representative of Commodity, may act for and on behalf of Commodity in carrying out the provisions of this agreement.

16. The warehouseman, at his own expense, shall take all necessary steps to keep all of the grain which is stored in the warehouse, whether commingled, specially binned or otherwise stored so as to preserve its identity, from going out of condition, and shall condition any such grain which is out of condition or in danger of becoming so, to the extent that the warehouse is equipped to do so, but, if after the exercise of such care in receiving, storing, and conditioning of such grain as a reasonably prudent owner thereof would exercise, deterioration cannot be prevented by conditioning, the warehouseman shall immediately notify Commodity of such fact, if the warehouse receipts held by Commodity are the oldest outstanding receipts representing the commingled grain which is out of condition or in danger of becoming so, or if such grain has been specially binned under this agreement, and shall dispose of, or care for, such grain at the expense of and in accordance with the directions of Commodity.

17. In the case of identity-preserved or specially binned grain, or in the case of grain received for handling only, the warehouseman shall deliver the identical grain received, and shall be liable for shrinkage and for deficiencies in the quality of such grain only in the event such shrinkage or deficiency in quality results from his failure to use due care, or his failure to provide appropriate warehousing services: Provided, however, That if such grain is commingled with other grain, the warehouseman's liability shall be as defined in section 11. Grain other than corn shall not be deemed to be specially binned or identity-preserved unless authorized by the owner or Commodity, and unless the warehouse receipts are plainly marked "specially binned" or "identity-preserved" with the bin number shown thereon.

18. The warehouseman may store the grain, either in bulk or, when customary, in sacks, but unless the holder of the warehouse receipts directs loading out in sacks, the warehouseman shall load out such grain in bulk.

19. Except as otherwise directed by Commodity, the warehouseman shall hold and, subject to the provisions of this section, may use any freight bill or transit tonnage slip which comes into the warehouseman's possession, in

connection with such grain. [illegible] iately u[illegible] receipt of such freight bi[illegible] transit tonnage slip, the warehouseman shall furnish to the holder of the warehouse receipt or Commodity, in the form prescribed by it, a statement showing the original shipping point, date and number of waybill, date and number of the freight bill, the name of the carrier, the transit weight, the rate paid in and the amount collected, and the unused transit privileges, and the warehouseman shall, in accordance with the carrier's tariff and rules of the carrier's agent, record in his own name each such freight bill or transit tonnage slip evidencing transit privileges and take all steps necessary to assure the shipper such transit privileges. Subject to the provisions of sections 6 and 17, the warehouseman, in connection with the sale, transfer, or loading out of any of such grain, may substitute for grain shipped under any such freight bill or transit tonnage slip in accordance with the request of Commodity or the owner of the grain, other grain and freight bills or transit tonnage slips of value equal, and transit privileges comparable, to those described in the statement furnished to Commodity or the holder of the warehouse receipt. The warehouseman and the holder of the warehouse receipt shall adjust any difference in value due to such exchange. If the warehouseman and the holder of any warehouse receipt representing such grain agree, the warehouseman and such holder may exchange the grain and billing received for a quantity of grain which has not been shipped by rail, equivalent in value to the grain and billing received.

20. In the event the warehouse receipts are transferred to any persons not entitled to the benefits of this agreement, there shall be affixed to such warehouse receipts, prior to such transfer, a statement of unpaid charges which accrued under this agreement, or a statement showing the period for which the rates provided for herein are applicable, and the warehouseman shall not charge for services rendered during that period an amount in excess of that computed in accordance with any such statement.

21. The period for which the Schedule of Rates shall apply shall begin with the date on which each lot of grain is stored in the warehouse, or the date on which each lot of grain stored in the warehouse becomes subject to the terms of this agreement, whichever is later, and shall end one year later, and subsequent periods for each such lot of grain shall be annual, except that the first period for all grain, except soybeans and corn, which on any applicable renewal date of this agreement is in the possession of, but not owned by, Commodity or in the possession of a lending agency, in connection with a loan made or made available by Commodity, shall end with such renewal date, and subsequent periods shall be annual. The first period for soybeans in the possession of, but not owned by, Commodity or in the possession of any lending agency, in connection with a loan made or made available by Commodity, shall end September 30 following the date the soybeans were stored, and the first period for corn in the possession of, but not owned by, Commodity or in the possession of any lending agency in connection with a loan made or made available by Commodity, shall end October 31 following the date the corn was stored, and subsequent periods for each such lot of soybeans and corn shall be annual. Any period for which the Schedule of Rates applies shall, in any event, end (1) upon transfer of the warehouse receipts to anyone not entitled to the benefits of this agreement, on the date of such transfer, and (2) in the case of shipment by Commodity, upon the date specified in the shipping instructions to the warehouseman, unless a delay in shipment is occasioned by circumstances beyond the warehouseman's control, then on the date of shipment, but in no event earlier than the date on which the warehouse receipts are surrendered.

22. The weights and grades of all grain received into the warehouse shall be the official weights and grades at the point of storage, if official weights and grades can be determined at that point, otherwise the weights and grades shall be determined by the best available means at the point of storage, and, upon the request of the owner of the grain, the grades shall be determined by the grading laboratory maintained under the supervision of the State Field Office of the Production and Marketing Administration of the State where the warehouse is located, or any grading laboratory qualified to issue official grade certificates on the basis of sample taken by a licensed sampler, or a sample which the owner and warehouseman agree to be representative, except that in no event shall unofficial weights and grades prevail over official weights and grades subsequently determined.

23. Any agency of the United States under the general supervision of the Secretary of Agriculture shall be entitled to the services and facilities of the warehouseman with respect to grain owned by or in the possession of such agency upon the same term and conditions as set out in this agreement with respect to grain owned by or in the possession of Commodity.

24. For the purpose of this agreement, the following terms shall be construed to mean, respectively,

(a) GRAIN - Wheat, Corn, Rye, Barley, Grain Sorghums, Soybeans, Flaxseed, and any other grain or farm products customarily handled in warehouses in the same manner as grain.

(b) RECEIVING - Receiving and unloading from cars, boats, barges, trucks, or other conveyances, and elevating into, bulking, cutting-in, or piling in the warehouse.

(c) CONDITIONING - Elevating, screening, blowing, cooling, reracking, repair of sacks, fumigating, or such other operations as may be necessary to preserve the class, grade, and quality of the grain.

(d) LOADING OUT - Loading out, including cutting and emptying sacks, and wharfage from the warehouse into cars, boats, barges, trucks, or other conveyances.

(e) OFFICIAL GRADES - Grades established by an inspector licensed under the United States Grain Standards Act in accordance with the Official Grain Standards of the United States in effect at the time the grades were established.

(f) OFFICIAL WEIGHTS - Weights established by a licensed weighmaster, or one whose weight certificates are recognized by common carriers as official in the payment of railroad claims for losses in transit.

25. This agreement shall become effective except as provided in Paragraph 26 hereof upon its signature on behalf of Commodity, and shall continue in full force and effect until the first May 31 thereafter with respect to all warehouses located in the States of Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, and Texas, and until the first June 30 thereafter with respect to all warehouses located in all other States. This agreement shall be renewed automatically from year to year thereafter, unless either party notifies the other, by written notice at least 30 days prior to the next renewal date, of his election to terminate the agreement upon such renewal date. If the warehouseman elects to terminate this agreement

on any renewal date, and at the time of such termination there is stored in the warehouse grain which has not been stored for the complete period used in computing charges, the storage charges with respect to such grain, whether paid or not, shall be adjusted to the storage charges for such entire period in proportion to the part of such period during which such grain was stored.

26. The terms of this agreement shall prevail over the written or printed terms of the warehouse receipts representing the grain, and this agreement shall supersede any existing Uniform Grain Storage Agreement between the warehouseman and the Secretary of Agriculture, as of the last annual renewal date of such agreement, except that charges for services performed under any such prior agreement shall be paid in accordance with the terms of such prior agreement, and the storage charges under this agreement shall not begin to accrue until the expiration of any free time to which the holder of any warehouse receipt is entitled under the terms of any such prior agreement.

27. The warehouseman shall not make any charge for any service not covered by this agreement unless such service is performed upon the prior authorization of Commodity, except that Commodity shall reimburse the warehouseman for payment made by him of usual charges for services required in connection with the loading out of grain for Commodity.

28. In the event of the failure of the warehouseman to load out any grain in accordance with the terms of this agreement, time being of the essence of this provision, Commodity shall have the right, unless such failure is excused by law, to terminate this agreement, and, in the event either of the parties hereto shall default in the performance of any other provision herein, the other party, if such default is not cured within fifteen (15) days after a written notice is mailed to the party in default, shall have the right to terminate this agreement without thereby being deprived of any claim for damages on account of such default.

29. This agreement, or any claims arising hereunder, shall not be assigned in whole or in part. No convict labor shall be employed in carrying out any provisions of this agreement. No Member of, or Delegate to, Congress, or any Resident Commissioner, shall be admitted to any share or part of this agreement or to any benefit to arise therefrom, except that this provision shall not be construed to extend to their interest in any incorporated company, if the agreement be for the general benefit of such corporation or company.

30. The warehouseman, in the performance of this agreement, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall include a similar provision in all subcontracts entered into in connection with the provisions of this agreement.

31. The warehouseman shall have fulfilled his obligation to notify Commodity as required in this agreement only if such notice is served in writing on the Director, Field Office, Grain Branch, Production and Marketing Administration, in the area in which the warehouse is located.

32. This agreement shall be executed by the signature of the warehouseman and of a duly authorized representative of Commodity.

COMMODITY CREDIT CORPORATION

By _____
CONTRACTING OFFICER - CCC
(Title)
DALLAS 2, TEXAS

JUL 25 1949

In presence of Mary J. Brennan .

O. L. Shannon
(Warehouseman)
owner

By _____
(Title)

JUN 20 1949
SHIPPING & STORAGE
DIVISION
DALLAS

C.C.C. Form [redacted]
REVISED [redacted]

UNITED STATES DEPARTMENT OF AGRICULTURE
COMMODITY CREDIT CORPORATION

UNIFORM GRAIN STORAGE AGREEMENT

ASCS-[redacted]
Code [redacted]

JUN 2 1957

U.S. DEPT. OF AGRI.

1. This Agreement, made and entered into this First day of July, 1949, by and between the Commodity Credit Corporation, hereinafter referred to as "Commodity", and O. L. Shannon of principal place of business at Sudan, Texas hereinafter referred to as the "warehouseman";

WITNESSETH:

2. WHEREAS, the warehouseman owns or operates an elevator or warehouse located at Sudan, Texas Street, on the P & SF Santa Fe Railroad, in the city of Sudan, [redacted] County of Lamb, and the State of Texas, and known as Shannon Elevator D, hereinafter referred to as the "warehouse"; and

3. WHEREAS, Commodity desires that the facilities of the warehouse be made available with respect to grain as defined in this agreement, owned by, or in the possession of, Commodity or any other agency of the United States under the general supervision of the Secretary of Agriculture, or in the possession of any lending agency in connection with a loan made available by Commodity, or, on or of the date of deposit, grain which is deposited in the warehouse by a producer, and later becomes security for a loan made, or made available, by Commodity (such grain being hereinafter referred to as "the grain" or as "grain subject to the terms of this agreement");

4. NOW, THEREFORE, in consideration of the covenants and agreements herein contained, and for other good and valuable considerations, the parties hereto covenant and agree as follows:

5. The warehouseman shall receive, store (up to the capacity made available by him), insure (except as hereinafter provided), condition, and load out the grain in accordance with the directions of Commodity, at the applicable rates specified in the Schedule of Rates attached hereto.

6. Upon receipt by the warehouseman of the grain, or when grain in store is purchased by Commodity, the warehouseman shall issue, in such form as meets the approval of Commodity, either negotiable or nonnegotiable, warehouse receipts as Commodity may request, representing the grain and shall indicate on such receipts the method by which the grain was received by him, accompanied by inbound weight certificates, when available, and, when requested by Commodity or the owner of the grain, inspection certificates describing the test weight and special grading factors, if any, and specifying the percentage of damaged kernels, foreign material, moisture content, and grain of other classes, and protein certificates or documents describing the quality of the grain, provided that with the consent of the depositor, a protein certificate representing wheat received by wagon, truck or less than carload lots may be issued on the basis of the station average for protein.

7. The warehouseman shall keep all the grain which is stored in the warehouse and covered in this agreement, and shall at all times maintain in the warehouse a stock of grain of the class, grade, and quality of the grain described in the outstanding warehouse receipts and accompanying certificates or documents, sufficient to deliver from the warehouse the grain described in such receipts and accompanying certificates or documents, and to the extent that facilities of the warehouse are made available, he shall store all such stored hereunder, and such other of the grain as Commodity may request, in special bins, according to class and grade, so as to preserve the identity.

8. The warehouseman shall load out or deliver to the holder of any warehouse receipt grain of the same class, grade, quantity and quality, or better, and, in the case of wheat, of a protein content within three-tenths of one percent, as that described by the surrendered warehouse receipt and accompanying certificates or documents, and wheat of country-run quality equal to that received into the warehouse, except that, in the case of grain which was received by wagon, truck, or less than carload lots, the quality may be the average of the quality described in the surrendered warehouse receipts and accompanying documents or certificates. At locations where an official grading services or protein laboratories are available, the warehouseman may load out or deliver wheat of any merchantable grade which is fairly representative of the wheat described in the warehouse receipts, provided, however, that such wheat shall be subject to discounts as provided in section 11. For the purposes of this section and section 11, the grade, quality, and protein content of wheat represented by a group of warehouse receipts included in one shipping order shall be the weighted average of the grade, quality, and protein content of the wheat represented by such group of warehouse receipts. Wheat not meeting the requirements of this section may be rejected, and if accepted shall be subject to the discounts provided in section 11.

9. Without in any way limiting his obligation under the other provisions of this agreement, the warehouseman shall insure, and at all times keep insured, in his own name, all the grain for the full market value thereof, against loss or damage by fire, lightning, inherent explosion, windstorm, cyclone, or tornado, and, in the event of any loss or damage to the grain, or to the warehouse, whether or not such loss was insured against, he shall immediately notify Commodity and the holders of the warehouse receipts representing such grain, or the holders appear in the records of the warehouseman, and he shall at his own expense promptly take the steps necessary to collect any damage which may be due as indemnity for such loss or damage, including the bringing of suit, and, as soon as collected, shall pay to the holders of such warehouse receipts such damage as may be collected for the loss or damage. In the event the warehouseman insures against hazards to the grain not specified herein, such insurance shall inure to the benefit of the holders of the warehouse receipts. In the event of loss or damage

to the grain, all charges provided for by this agreement with respect to the grain so lost or damaged shall be paid until and cease as of the date of such loss or damage.

10. The warehouseman shall observe the carriers' tariff and loading requirements, and shall indemnify Commodity against minimum weight penalties and demurrage, except those that are incurred due to circumstances beyond his control, and he shall assume all inbound switching charges which are recoverable or which are absorbed by the carrier on outbound shipments.

11. In the event that any of the grain which is loaded out by the warehouseman is found - on the basis of official weights and grades at the point of storage, or, if official weights and grades are not available at such point, on the basis of official weights and grades at destination or at the inspection point shown on the shipping order furnished the warehouseman, which unless otherwise agreed shall be the customary location, on the route of shipment, of an inspector licensed under the United States Grain Standards Act - to be of a class, grade, quantity or quality lower than that described by warehouse receipts, and accompanying certificates or documents, surrendered by Commodity, the warehouseman shall indemnify Commodity in an amount equal to the difference between the value of the grain loaded out and the value of the grain described by the warehouse receipts and accompanying certificates or documents, on the basis of cash prices current at the terminal market customarily applicable to grain stored in the warehouse at the time when the grain was shipped. In the case of wheat received by the warehouseman by rail or barge and in the case of all of the grain other than wheat, settlement shall be made on the basis of each shipping order. In the case of wheat received by wagon or truck, settlement shall be made on the basis of each year's crop stored at the warehouse, Commodity to issue shipping orders based on the weighted average of such year's crop, and debits and credits to be established accordingly on each shipping order, the debits and credits to be set off against each other, and final cash settlement made after the date the last grain of such year's crop is loaded out or sold or otherwise disposed of, any credits not set off against debits of such crop year to be dropped and not carried forward.

12. Unless the warehouseman operated the warehouse under a license issued by the Secretary of Agriculture under the United States Warehouse Act, he shall comply with such conditions as may be prescribed by Commodity prior to the execution of this agreement. The warehouseman shall furnish Commodity such bond or bonds as may from time to time be required by Commodity, and, at any time during business hours, he shall permit Commodity to inspect the warehouse and its equipment, inspect, measure or take inventories of grain stored therein, and examine the stock records, receipt books, insurance policies, and other documents pertaining to such grain.

13. Upon the request of Commodity or the owner of the grain, the warehouseman shall furnish a sample thereof, agreed by the warehouseman and the owner of the grain to be a representative sample.

14. Commodity shall cause to be paid, with respect to the grain owned by Commodity, upon the presentation of a proper invoice, all accrued charges at the applicable rates specified in the Schedule of Rates attached hereto, as of June 30, September 30, December 31, and March 31, of each year (unless the warehouse receipts are surrendered prior to any such date, in which case payments shall be made as of such surrender date), and Commodity shall cause to be paid with respect to the grain in the possession of, but not owned by Commodity, or in the possession of any lending agency in connection with any loan made or made available by Commodity, upon presentation of a proper invoice to the holder of the warehouse receipts representing such grain, all accrued charges at the applicable rates specified in the Schedule of Rates, as of the applicable renewal date of this agreement, provided, however, that at the option of Commodity, a semi-annual payment of warehouse charges not to exceed one-half of the annual storage rate, plus receiving charges for the grain which has been in store for at least six months after the annual renewal date of the agreement, may be made for the grain in the possession of, but not owned by Commodity, or in the possession of any lending agency, in connection with a loan made or made available by Commodity.

15. The Director of the Grain Branch, Production and Marketing Administration, the Directors of the Chicago, Kansas City, Minneapolis, and Portland offices of said Grain Branch, or the duly authorized representatives of any of such officials, or any other duly authorized representative of Commodity, may act for and on behalf of Commodity in carrying out the provisions of this agreement.

16. The warehouseman, at his own expense, shall take all necessary steps to keep all of the grain which is stored in the warehouse, whether commingled, specially binned or otherwise stored so as to preserve its identity, from going out of condition, and shall condition any such grain which is out of condition or in danger of becoming so, to the extent that the warehouse is equipped to do so, but, if after the exercise of such care in receiving, storing, and conditioning of such grain as a reasonably prudent owner thereof would exercise, deterioration cannot be prevented by conditioning, the warehouseman shall immediately notify Commodity of such fact, if the warehouse receipts held by Commodity are the oldest outstanding receipts representing the commingled grain which is out of condition or in danger of becoming so, or if such grain has been specially binned under this agreement, and shall dispose of, or care for, such grain at the expense of and in accordance with the directions of Commodity.

17. In the case of identity-preserved or specially binned grain, or in the case of grain received for handling only, the warehouseman shall deliver the identical grain received, and shall be liable for shrinkage and for deficiencies in the quality of such grain only in the event such shrinkage or deficiency in quality results from his failure to use due care, or his failure to provide appropriate warehousing services: Provided, however, That if such grain is commingled with other grain, the warehouseman's liability shall be as defined in section 11. Grain other than corn shall not be deemed to be specially binned or identity-preserved unless authorized by the owner or Commodity, and unless the warehouse receipts are plainly marked "specially binned" or "identity-preserved" with the bin number shown thereon.

18. The warehouseman may store the grain, either in bulk or, when customary, in sacks, but unless the holder of the warehouse receipts directs loading out in sacks, the warehouseman shall load out such grain in bulk.

19. Except as otherwise directed by Commodity, the warehouseman shall hold and, subject to the provisions of this section, may use any freight bill or transit tonnage slip which come into the warehouseman's possession, in

connection with such grain. Immediately upon receipt of such freight bills or transit tonnage slips, the warehouseman shall furnish to the holder of the warehouse receipt or Commodity, in the form prescribed by it, a statement showing the original shipping point, date and number of waybill, date and number of the freight bill, the name of the carrier, the transit weight, the rate paid in and the amount collected, and the unused transit privileges, and the warehouseman shall, in accordance with the carrier's tariff and rules of the carrier's agent, record in his own name such freight bill or transit tonnage slip evidencing transit privileges and take all steps necessary to secure the shipper such transit privileges. Subject to the provisions of sections 8 and 17, the warehouseman, in connection with the sale, transfer, or loading out of any of such grain, may substitute for grain shipped under any such freight bill or transit tonnage slip in accordance with the request of Commodity or the owner of the grain, other grain and freight bills or transit tonnage slips of value equal, and transit privileges comparable, to those described in the statement furnished to Commodity or the holder of the warehouse receipt. The warehouseman and the holder of the warehouse receipt shall adjust any difference in value due to such exchange. If the warehouseman and the holder of any warehouse receipt representing such grain agree, the warehouseman and such holder may exchange the grain and billing received for a quantity of grain which has not been shipped by rail, equivalent in value to the grain and billing received.

20. In the event the warehouse receipts are transferred to any person not entitled to the benefits of this agreement, there shall be affixed to such warehouse receipts, prior to such transfer, a statement of unpaid charges which accrued under this agreement, or a statement showing the period for which the rates provided for herein are applicable, and the warehouseman shall not charge for services rendered during that period an amount in excess of that computed in accordance with any such statement.

21. The period for which the Schedule of Rates shall apply shall begin with the date on which each lot of grain is stored in the warehouse, or the date on which each lot of grain stored in the warehouse becomes subject to the terms of this agreement, whichever is later, and shall end one year later, and subsequent periods for each such lot of grain shall be annual, except that the first period for all grain, except soybeans and corn, which on any applicable renewal date of this agreement is in the possession of, but not owned by, Commodity or in the possession of a loading agency, in connection with a loan made or made available by Commodity, shall end with such renewal date, and subsequent periods shall be annual. The first period for soybeans in the possession of, but not owned by, Commodity or in the possession of any loading agency, in connection with a loan made or made available by Commodity, shall end September 30 following the date the soybeans were stored, and the first period for corn in the possession of, but not owned by, Commodity or in the possession of any loading agency in connection with a loan made or made available by Commodity, shall end October 31 following the date the corn was stored, and subsequent periods for each such lot of soybeans and corn shall be annual. Any period for which the Schedule of Rates applies shall, in any event, end (1) upon transfer of the warehouse receipts to anyone not entitled to the benefits of this agreement, on the date of such transfer, and (2) in the case of shipment by Commodity, upon the date specified in the shipping instructions to the warehouseman, unless a delay in shipment is occasioned by circumstances beyond the warehouseman's control, then on the date of shipment, but in no event earlier than the date on which the warehouse receipts are surrendered.

22. The weights and grades of all grain received into the warehouse shall be the official weights and grades at the point of storage, if official weights and grades can be determined at that point, otherwise the weights and grades shall be determined by the best available means at the point of storage, and, upon the request of the owner of the grain, the grades shall be determined by the grading laboratory maintained under the supervision of the State Field Offices of the Production and Marketing Administration of the State where the warehouse is located, or any grading laboratory qualified to issue official grade certificates on the basis of sample taken by a licensed sampler, or a sample which the owner and warehouseman agree to be representative, except that in no event shall unofficial weights and grades prevail over official weights and grades subsequently determined.

23. Any agency of the United States under the general supervision of the Secretary of Agriculture shall be entitled to the services and facilities of the warehouseman with respect to grain owned by or in the possession of such agency upon the same terms and conditions as set out in this agreement with respect to grain owned by or in the possession of Commodity.

24. For the purpose of this agreement, the following terms shall be construed to mean, respectively,

(a) GRAIN - Wheat, Corn, Rye, Barley, Grain Sorghums, Soybeans, Flaxseed, and any other grain or farm products customarily handled in warehouses in the same manner as grain.

(b) RECEIVING - Receiving and unloading from cars, boats, barges, trucks, or other conveyances, and elevating into, bulking, cutting-in, or piling in the warehouse.

(c) CONDITIONING - Reelevating, screening, blowing, cooling, resacking, repair of sacks, fumigating, or such other operations as may be necessary to preserve the class, grade, and quality of the grain.

(d) LOADING OUT - Loading out, including cutting and emptying sacks, and wharfage from the warehouse into cars, boats, barges, trucks, or other conveyances.

(e) OFFICIAL GRADES - Grades established by an inspector licensed under the United States Grain Standards Act in accordance with the Official Grain Standards of the United States in effect at the time the grades were established.

(f) OFFICIAL WEIGHTS - Weights established by a licensed weighmaster, or one whose weight certificates are recognized by common carriers as official in the payment of railroad claims for losses in transit.

25. This agreement shall become effective except as provided in Paragraph 26 hereof upon its signature on behalf of Commodity, and shall continue in full force and effect until the first May 31 thereafter with respect to all warehouses located in the States of Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, and Texas, and until the first June 30 thereafter with respect to all warehouses located in all other States. This agreement shall be renewed automatically from year to year thereafter, unless either party notifies the other, by written notice at least 30 days prior to the next renewal date, of his election to terminate the agreement upon such renewal date. If the warehouseman elects to terminate this agreement

on any renewal date, and on the date of such termination there is stored in the warehouse grain which has not been stored for the complete period used in computing charges, the storage charges with respect to such grain, whether paid or not, shall be refunded by the storage charges for such entire period in proportion to the part of such period during which such grain was stored.

25. The terms of this agreement shall prevail over the written or printed terms of the warehouse receipts representing the grain, and this agreement shall supersede any existing Uniform Grain Storage Agreement between the warehouseman and the Secretary of Agriculture, as of the last annual renewal date of such agreement, except that charges for services performed under any such prior agreement shall be paid in accordance with the terms of such prior agreement, and the storage charges under this agreement shall not begin to accrue until the expiration of any free time to which the holder of any warehouse receipt is entitled under the terms of any such prior agreement.

27. The warehouseman shall not make any charge for any service not covered by this agreement unless such service is performed upon the prior authorization of Commodity, except that Commodity shall reimburse the warehouseman for payment made by him of usual charges for services required in connection with the loading out of grain for Commodity.

28. In the event of the failure of the warehouseman to load out any grain in accordance with the terms of this agreement, time being of the essence of this provision, Commodity shall have the right, unless such failure is excused by law, to terminate this agreement, and, in the event either of the parties hereto shall default in the performance of any other provision herein, the other party, if such default is not cured within fifteen (15) days after a written notice is mailed to the party in default, shall have the right to terminate this agreement without thereby being deprived of any claim for damages on account of such default.

29. This agreement, or any claims arising hereunder, shall not be assigned in whole or in part. No convict labor shall be employed in carrying out any provisions of this agreement. No Member of, or Delegate to, Congress, or any Resident Commissioner, shall be admitted to any share or part of this agreement or to any benefit to arise therefrom, except that this provision shall not be construed to extend to their interest in any incorporated company, if the agreement be for the general benefit of such corporation or company.

30. The warehouseman, in the performance of this agreement, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall include a similar provision in all subcontracts entered into in connection with the provisions of this agreement.

31. The warehouseman shall have fulfilled his obligation to notify Commodity as required in this agreement only if such notice is served in writing on the Director, Field Office, Grain Branch, Production and Marketing Administration, in the area in which the warehouse is located.

32. This agreement shall be executed by the signature of the warehouseman and of a duly authorized representative of Commodity.

COMMODITY CREDIT CORPORATION

By _____
CONTRACTING OFFICER (CCC)
ROOM 217 - [illegible]
DALLAS 2, TEXAS

JUL 25 1949

In presence of Mary Bowman

(Warehouseman)

By O. L. Shannon
Owner
(Title)

COMMODITY CREDIT CORPORATION FORM 99 (6-7-50) FORMERLY CCC Form 99

U. S. DEPARTMENT OF AGRICULTURE
PRODUCTION AND MARKETING ADMINISTRATION
COMMODITY CREDIT CORPORATION

UNIFORM GRAIN STORAGE AGREEMENT

No. 871-5-000-515

1. This Agreement, made and entered into this First day of June, 1950, by and between Commodity Credit Corporation, hereinafter referred to as "Commodity", and D. L. Shannon d/b/a Shannon Elevator, with principal place of business at Dodan, Texas, hereinafter referred to as the "warehouseman";

WITNESSETH:

2. WHEREAS, the warehouseman represents that he owns or operates the elevator(s) or warehouse(s) located in the state(s) of Texas and described on the attached "Schedule of Warehouses" and that each elevator(s) or warehouse(s), hereinafter referred to as the "warehouse", has the equipment and facilities which are listed in his application for approval under the Uniform Grain Storage Agreement for the receiving, handling, conditioning, warehousing, storing and loading out of grain; and

3. WHEREAS, Commodity desires that the facilities of the warehouse be made available with respect to grain as defined in this Agreement, owned by, or in the possession of, Commodity or any other agency of the United States under the general supervision of the Secretary of Agriculture, or to the possession of any lending agency in connection with a loan made available by Commodity, or, as of the date of deposit, grain which is deposited in the warehouse by a producer, and later is delivered to Commodity under a price support "Purchase Agreement", or becomes security for a loan made, or made available, by Commodity (such grain being hereinafter referred to as "the grain" or as "grain subject to the terms of this agreement"); it

4. NOW, THEREFORE, in consideration of the premises, the parties hereto covenant and agree as follows:

5. AGREEMENT TO COVER ALL THE GRAIN ACCEPTED - All the grain accepted by the warehouseman shall be received, stored (if the grain is to be stored) conditioned up to the capacity made available by him, conditioned, handled out and shipped as requested by the owner or other authorized person or agency and in accordance with the provisions of this agreement and the applicable Uniform Grain Storage Agreement Schedule of Rates (hereinafter referred to as "Schedule of Rates");

6. BASIS OF WHICH GRAIN IS RECEIVED OR STORED - (a) All the grain stored in the warehouse shall be deemed to be stored commingled with other grain, and the responsibility of the warehouseman with respect thereto shall be as if stored commingled, unless Commodity has specially contracted the grain to be stored identity preserved in such a manner that the actual grain deposited (and no other) may be delivered to the holder of the warehouse receipt, and unless the warehouse receipt or accompanying certificates is plainly marked in a manner satisfactory to Commodity that the grain is stored identity preserved. Grain subject to the terms of this agreement accepted by the warehouseman for storage may be regarded as so stored identity preserved only to the extent that he makes space available for that purpose.

(b) Grain subject to the terms of this agreement accepted by the warehouseman for handling only which is not of a storable grade and quality shall be handled identity preserved. If the grain accepted for handling only is of storable grade and quality, it shall be deemed to be commingled with other grain, and the responsibility of the warehouseman with respect thereto shall be as if stored commingled, in the absence of a special agreement between Commodity and the warehouseman that it shall be handled identity preserved.

7. OBLIGATION TO MAINTAIN STOCKS IN WAREHOUSE - (a) With respect to the grain stored commingled, the warehouseman shall at all times maintain in the warehouse indicated on the warehouse receipts and in which the grain was originally deposited for storage a stock of grain of the quantity, class, grade, and quality which he is obligated to deliver under the warehouse receipts.

(b) With respect to the grain which is stored identity preserved, the warehouseman shall at all times maintain the identical grain in the warehouse indicated in the warehouse receipt.

8. DETERMINATION OF RECEIVED WEIGHTS AND GRADES - The class, grade, quality and quantity of all the grain received into the warehouse, whether for storage or for handling only, and whether it is to be commingled or identity preserved, shall be determined on the basis of official weights and grades at the warehouse location, if official weights and grades can be determined at that point, otherwise the weights and grades shall be determined by the best available means at the warehouse location. And, upon the request of the owner of the grain or the warehouseman, the grades shall be determined by the grading laboratory maintained under the supervision of the State Office of the Production and Marketing Administration of the State where the warehouse is located, or any grading laboratory qualified to issue official grain certificates, on the basis of a sample taken by a licensed sampler, or a sample which the owner and warehouseman agree to be representative.

9. WAREHOUSE RECEIPTS AND CERTIFICATES - (a) With respect to the grain which is accepted by the warehouseman for storage, the warehouseman shall upon receipt of the grain, or when grain is stored in purchased by Commodity, issue, in form approved by Commodity, negotiable or nonnegotiable warehouse receipts as requested by the person or agency entitled thereto and shall indicate thereon the manner by which the grain was received by him (i.e., wagon, truck, rail, barge, ship, etc.). The warehouseman shall, if requested, make available to Commodity all available official weight, inspection, and protein certificates and shall, if requested, execute in such form as Commodity may prescribe, a supplemental certificate to accompany the warehouse receipt, setting out all grading factors shown on the official inspection and protein certificates. When official weight, inspection and protein certificates are not available, the warehouseman shall, if requested by Commodity, execute in such form as Commodity shall prescribe, a supplemental certificate to accompany the warehouse receipt, setting out the class, grade, percentage of damage, test weight, foreign material content, protein content, moisture content, and any other grading factors affecting the quality of the grain, as determined in accordance with section 8.

(b) With respect to the grain which is accepted by the warehouseman for handling only, the warehouseman shall execute a certificate, on such form as Commodity may prescribe, as to the quantity, class, grade, test weight, percentage of damage, foreign material content, protein content, moisture content, and any other grading factors affecting the quality of the grain, as determined in accordance with section 8.

10. RESPONSIBILITY FOR CONDITION OF GRAIN - (a) The warehouseman, at his own expense, shall take all necessary steps to keep all of the grain which is stored in the warehouse, whether commingled or identity preserved, free

going out of condition, and shall condition any such grain which is out of condition or in danger of becoming so, to the extent that the warehouseman is equipped to do so. The warehouseman shall promptly notify Commodity if any of the grain requires drying, and if authorized by Commodity, shall promptly dry the grain if the warehouse is equipped with drying facilities, payment therefor to be made at a rate agreed to by Commodity and the warehouseman or, if no rate is agreed to, at the warehouseman's customary rate, except that no payment shall be made for drying which is occasioned by negligence on the part of the warehouseman. If after the exercise of such care in receiving, storing, and conditioning of such grain as a reasonably prudent owner thereof would exercise, deterioration cannot be prevented by conditioning an examination by an inspection at the expense of the warehouseman (such inspection to be performed by an inspector licensed under the United States Grain Standards Act or by an inspector agreed upon promptly by the warehouseman and Commodity) the warehouseman shall immediately notify Commodity of such fact, if the warehouse receipts held by Commodity are the oldest outstanding receipts representing the commingled grain which is out of condition, or in danger of becoming so, or if such grain is stored identity preserved under this agreement, and shall dispose of, or care for, such grain at the expense of and in accordance with the directions of Commodity. Unless the warehouseman fails to exercise due care or fails to comply with the directions of Commodity, he shall be liable for deterioration in the quality of such grain which is determined to be out of condition or in danger of becoming so only until the date he notifies Commodity or the date such inspection is performed, whichever is later.

(b) Commodity hereby designates the warehousemen as its agent for the purpose of effecting the removal of the most or any bin of grain stored identity preserved, in order for the warehousemen to comply with his obligation to condition such grain.

11. LOAD OUT REQUIREMENTS - (a) If rail facilities are not available at the elevator(s) or warehouse(s) described on the attached "Schedule of Warehouses", the warehousemen shall upon surrender of warehouse receipts representing the grain stored in such elevator(s) or warehouse(s), when so requested by Commodity, deliver the grain into railroad cars or other transportation conveyance at the delivery point indicated in column 8, "Schedule of Warehouses", and the provisions of this agreement, including the requirement for insurance, shall apply to such grain until loaded into the transportation conveyance and accepted by the carrier.

(b) Upon the surrender of warehouse receipts representing grain subject to the terms of this agreement which is stored commingled at a location where official grades and quality determinations are available, the warehousemen shall load out grain of the same class and quantity as that described on the warehouse receipts and accompanying documents, and:

(i) If Commodity surrenders warehouse receipts representing grain of different numerical grades on a loading order calling for the load out of grain of a uniform grade and quality, the warehousemen shall, if he be able to do so, load out grain of a uniform grade and quality equal to the weighted average of all grades and qualities described on the warehouse receipts and accompanying documents. If such weighted average quality is not by the usual delivery on the loading order, and if no car accepted by Commodity falls below the numerical grade called for by the loading order, such delivery shall be accepted without settlement for quality differences. If the warehousemen is unable to load out grain of such uniform grade and quality against the warehouse receipts surrendered, he shall so notify Commodity before loading out the grain so that an appropriate understanding may be reached with respect to loading out the uniform grade and quality.

(ii) If the warehousemen notifies Commodity that he cannot load out the uniform grade and quality called for by the loading order and an understanding is not reached with respect to loading out a uniform grade and quality, or if the loading order does not call for a uniform grade and quality, the warehousemen shall load out grain equal to the numerical grade and to the weighted average quality described on the warehouse receipts and accompanying documents for each numerical grade. Any cars falling below the applicable numerical grade may be rejected by Commodity or accepted and settlement, as provided in section 10, made for the difference between the value of such car of grain and the value of grain of the weighted average quality shown on the warehouse receipts and accompanying documents calling for the numerical grade. In the event such weighted average quality for any numerical grade is not met by the weighted average quality of the grain loaded out which is applicable to such numerical grade, any car of grain falling below such weighted average quality, even though within the numerical grade, may be rejected by Commodity, or accepted and settlement, as provided in section 10, made for the difference between the value of such car of grain and the value of grain of the weighted average quality shown on the warehouse receipts and accompanying documents calling for the numerical grade.

For the purposes of (i) and (ii) above, to the extent that grading factors are not shown on the inspection certificate, delivery of the numerical grade thereon specified is to be governed by official U. S. Grain Standards; shall satisfy the warehousemen's obligation (except as to protein content of wheat); it being specifically understood and agreed, however, that this provision shall not be construed as permitting the warehousemen to deliberately take advantage of the tolerances allowed under the U. S. Grain Standards Act or to depart from ethical warehousing practices.

(c) Upon the surrender of warehouse receipts representing grain subject to the terms of this agreement which is stored commingled at a location where official grades and quality determinations are not available, the warehousemen shall load out or deliver grain of the same class and quantity and of a grade and quality fairly representative of the grain described on the warehouse receipts and accompanying documents.

(d) With respect to handling only grain not identity preserved, the warehousemen shall load out grain of the same class and quantity and of a grade and quality fairly representative of the grain described on the certificates provided for in section 9 (b).

(e) Upon surrender of warehouse receipts representing the grain which is stored identity preserved, and in the case of grain which is tendered to the warehousemen for handling only on an identity preserved basis, the warehousemen shall load out or deliver the identical grain received.

(f) In connection with the load out of and settlement for wheat, the warehousemen shall be allowed a protein tolerance of 3/10 of one percent from that determined by an official protein laboratory or a protein laboratory approved by Commodity and shown on the warehouse receipt or other documents. With respect to warehousemen at locations where official grades are not available, such protein tolerance shall not be allowed unless the protein content of such lot of the wheat received by the warehouse is determined by such an official or approved protein laboratory.

(g) If the Official Grain Standards of the United States for the grain received are changed after the grain is received in storage and before it is loaded out, the provisions in effect at the time the grain was received into storage shall govern the responsibility of the warehousemen in surrendering out the grain and settling with respect to the grain loaded out.

12. DETERMINATION OF WEIGHTS AND GRADES ON LOAD OUT - The [illegible] of all grain loaded out by the warehousemen, whether stored or handled under this agreement, shall be determined by official weighmen on the basis of official weights and grades at the warehouse [illegible] official weighmen.

(8)

are not available at such point, on the basis of official weights and/or grades at destination or at the inspection point where on the outbound order furnished the warehouseman, which unless otherwise agreed, shall be the customary function on the basis of enlargement of an inspector licensed under the United States Grain Standards Act. Such inspection shall be for the account of Commodity. In the event either party calls for federal appeal reinspection, such reinspection shall be final and the expense thereof shall be for the account of the party requesting reinspections.

12. SETTLEMENTS WITH SHIPPERS - Settlement with respect to each individual warehouse for differences in value between the grain brought out and the grain described on the warehouse receipts and accompanying documents or on the certificates provided for in section 9 (b) shall be made in accordance with this section: Provided, That:

(i) In the case of warehouses at locations where official weights and grades are available, Commodity shall have the discretion to reject grain not meeting the applicable requirements of section 11, and the warehouse shall not be given credit for loading out the quantity of grain rejected. If the grain is rejected at destination, Commodity shall sell such grain for the account of the warehouseman unless the warehouseman has requested that rejected grain be held for his account. Objection at destination shall be on the basis of official grades at the loading warehouse location.

(ii) In the case of warehouses at locations where official weights and grades are not available, Commodity shall have the discretion to reject grain not meeting the applicable requirements of section 11, but the warehouseman shall pay Commodity the value of the grain which should have been delivered rather than replacing such rejected grain. Commodity shall sell rejected grain for the account of the warehouseman unless the warehouseman has requested that rejected grain be held for his account.

(b) Subject to the provisions of section 11, the warehouseman and Commodity shall make settlement with respect to each loading under the establishment between the value of the quantity and quality of the contracted grain which is loaded out of the warehouseman from locations where official weights and grades are not available and which is accepted by Commodity, and the grain described on the warehouse receipts and accompanying documents surrendered by Commodity or on the certificates provided for in section 9 (b), on the basis of cash prices current in the applicable terminal market as of the date of inspection of the final shipment under the applicable order to load out, except that the warehouseman shall not receive any credit for overdelivery in quality or between loading orders.

(c) Subject to the provisions of section 11, the warehouseman and Commodity shall make settlement for the differences between the value of the quantity and quality of the contracted grain which is loaded out by the warehouseman from locations where official weights and grades are not available and which is accepted by Commodity, and the grain described on the warehouse receipts and accompanying documents surrendered by Commodity or on the certificates provided for in section 9 (b), on the basis of cash prices current in the applicable terminal market as of the date of the final shipment under the applicable order to load out is accepted by the carrier: Provided, That, the warehouseman shall be allowed a quantity tolerance of 1/8 of one percent on the gross loading weight of short weight cars with respect to which the carrier's report of the condition of the car shows evidence of actual loss. The value of overdelivery in quality of such kind of grain shall be applied against the value of underdelivery in quality of the same kind of grain until all grain of such year's crop has been shipped, sold, or otherwise disposed of, or during such period of time as may be mutually agreed upon, except that the value of any underdelivery in quality of grain delivered which is determined to be of average grade shall not be eligible for offset. The value of any overdelivery in quality not so offset in making settlement for the year's crop, or during such agreed period of time, whichever is applicable, shall be dropped.

(d) In making settlement for load out of grain which is stored identity preserved, or grain which is tendered to the warehouseman for loading only as an identity preserved basis, the warehouseman shall be liable for shrinkage in weight and for deterioration in the quality of the grain only in the event such shrinkage or deterioration is quality exceeds that the delivery is not due care or its failure to provide appropriate conditioning services: Provided, That, if such grain is commingled with other grain, the warehouseman's liability shall be as defined in sections 11, 13, in the last sale.

14. RACKED GRAIN - Subject to all other provisions of this agreement, the warehouseman may store the grain either in bulk, or racked elevators, in making out orders the holder of the warehouse receipts representing grain received in racked elevators shall not be entitled to make out orders for grain received in bulk. Grain received in racks is to be delivered into empty cars shall be taken and retained by the warehouseman for the account and subject to order of the owner.

15. INSURANCE - Without in any way limiting his obligation under the other provisions of this agreement, the warehouseman shall insure and at all times keep insured, in his own name, all the grain for the full market value thereof (rather than the support price), against loss or damage by fire, lightning, inherent explosion, windstorm, cyclone, or tornado, and, in the event of loss or damage to the grain, or to the warehouse, whether or not such loss was insured against, he shall immediately notify Commodity and the holders of the warehouse receipts and the certificates provided for in section 9 (b) representing such grain, as the holders appear on the records of the warehouseman, and he shall or his own expense promptly take the steps necessary to collect any moneys which may be due as indemnity for such loss or damage, including the bringing of suit, and, as soon as collected, shall pay to the holders of such warehouse receipts and certificates such moneys as may be collected for the loss or damage. For purposes of this section, "full market value" shall mean the value required by law to be used by underwriters in paying for losses of grain insured for the actual cash value. The warehouseman shall pay to the holders of the warehouse receipts and certificates, in addition to the insurance proceeds, any amount by which the insurance proceeds are less than such full market value, whether resulting from failure to collect in full from the insurer, failure to obtain a policy providing full coverage, or failure to report the total value of grain on hand on the last reporting date under a reporting form of policy. In the event the warehouseman insures against hazards to the grain not specified herein, such insurance shall inure to the benefit of the holders of the warehouse receipts and certificates.

16. TARIFF REQUIREMENTS - COMMODITY TENDERED - (a) The warehouseman shall observe the transportation Agency's lawful tariffs and loading and unloading requirements, and shall indemnify Commodity against losses in weight due to the warehouseman's error in weighing or failure to remove all the grain from the transportation conveyances on unloading. The warehouseman shall indemnify Commodity against minimum weight penalties and demurrage (including storage in transportation conveyances) charges where incurred due to circumstances beyond the warehouseman's control. The warehouseman shall transmit all demurrage and storage charges which are recoverable or which are assessed by the carrier or sustained thereunder, and all connecting carrier charges resulting from diverting or reforwarding in accordance with instructions issued by Commodity. If adequate supply cars are available on the warehouse location, the warehouseman shall reimburse Commodity for any excess freight charges resulting from the unreasonable refusal of demurrage which are not offset by savings in freight charges resulting from diversion of cars.

(b) Except as otherwise directed by Commodity, the warehouseman shall hold not subject to the provisions of this section, insured for demurrage to the own name only freight and forwarding bill, transit demurrage or credit

slip in connection with the grain, or [redacted] the period of time required by and in accordance with the carrier's lawful published tariffs. Immediately upon receipt of any such freight or warehouse bill or transit voucher or credit slip, the warehouseman shall complete and forward to the holder of the warehouse receipt, or Commodity, as the case may be, a statement showing the warehouseman's name and location of the warehouse, the origin carrier, the original shipping and billing point, full inbound route and junction points, date and number of the freight bill, date and number of the bill-of-lading, the kind of grain represented, the transit weight (not previously used), the freight rate to the transit point, the amount collected and the number of second transit stops. The warehouseman may use any freight bill or transit voucher slip which comes into its possession in connection with the grain and he or Commodity shall take all steps necessary to secure Commodity, or the shipper depositing tonnage with the warehouseman, transit protection comparable to and of value equal to that provided by the original billing, subject to all other applicable provisions of this agreement. The warehouseman, in connection with the sale, transfer, or loading out of any of the grain may substitute for the grain shipped under any such freight bill or transit voucher or credit slip, in accordance with the request of Commodity or the owner of the grain, other grain and valid freight bills or transit voucher or credit slips of value equal, and transit arrangements comparable to those described in the statement furnished to Commodity of the holder of the warehouse receipt. If the warehouseman and the holder of any warehouse receipt representing the grain agree, there may be substituted a quantity of grain and billing for a quantity of grain other than and not less obliged by rail equivalent in value to the grain and billing received. In either event the warehouseman and the holder of the warehouse receipt shall adjust any differences in value due to such substitution.

13. [illegible] WHEN SCHEDULE OF RATES APPLY - Charges for services under this agreement shall be at the rates specified in the Schedule of Rates in effect when such services are performed. Rates shall be computed on the basis of the net quantity of grain received in the warehouse, except where otherwise provided in the Schedule of Rates, and except that, during any handling or storing grain owned by Commodity identity preserved or specially binned shall be computed on a grain quantity basis. The period for which the Schedule of Rates shall apply shall begin with the date each lot of the grain is deposited in the warehouse, or the date grain not otherwise subject to the terms of this agreement is purchased by Commodity in store, and shall end as follows:

(i) In the event the grain is shipped by Commodity, storage charges shall cease upon the date specified in the shipping instructions issued by Commodity or the date shipment is accepted by the carrier which ever is earlier, unless a delay is occasioned by circumstances beyond the warehouseman's control, then on the date shipment is accepted by the carrier.

(ii) In the event the warehouse receipts are sold or transferred to any person not entitled to the benefits of this agreement, charges under this agreement shall cease on the date of transfer. Commodity shall notify the warehouseman of the date of transfer and shall affix to the warehouse receipts prior to transfer a statement showing the period for which the rates hereunder are applicable, and the warehouseman shall not charge for services rendered during that period an amount in excess of that computed in accordance with the rates in effect hereunder during that period.

(iii) In the event of loss or damage to the grain from insurable causes, all accrued charges provided in the Schedule of Rates and/or service payable with respect to the grain lost or damaged shall be paid up to the cease as of the date of loss or damage.

14. PAYMENT OF CHARGES - (a) At locations where official weights and grades are available

(i) As of June 30, September 30, and December 31, upon presentation of proper invoice, Commodity shall pay all charges due and unpaid on the grain in store represented by warehouse receipts in possession of the Commodity Offices and not ordered out as of that date.

(ii) Upon termination of the period for which the Schedule of Rates applies for any lot of the grain (i.e., when grain is loaded out, lost, damaged, or sold or transferred to storage), and upon presentation of proper invoice, Commodity shall pay all charges due and unpaid thereon.

(iii) In the event any invoice rendered by the warehouseman for services performed under this agreement has not been paid or returned for correction within 30 days after the date such invoice is received in the PMA Commodity Office, Commodity shall, upon demand of the warehouseman, make an advance to the warehouseman of not less than 90% of the amount of such invoice, if such advance proves to be in excess of the amount due, the warehouseman shall repay the excess amount to Commodity.

(b) At locations where official weights and grades are not available

(i) With respect to the grain acquired by Commodity under each price support program and represented by warehouse receipts in the possession of PMA Commodity Offices on the maturity date or dates specified for the program in the applicable price support bulletin, Commodity shall, as of such date or dates and without presentation of invoices, make a provisional payment in the amount specified in the applicable Schedule of Rates. Such payment shall not be construed to be made in settlement of charges on any particular lot of grain, and the amount so paid shall be offset against any invoice subsequently rendered for charges in connection with grain stored under this agreement to the properties that the quantity covered by such invoice bears to the quantity on which the provisional payment was determined. Any amount provisionally paid to the warehouseman which is not offset shall be repaid by him to Commodity upon termination of this agreement.

(ii) As of June 30 and December 31, upon presentation of proper invoice, Commodity shall, subject to the right of offset provided in (i)(ii) above, pay all charges due and unpaid on the grain in store represented by warehouse receipts in possession of PMA Commodity Offices and not ordered out as of that date.

(iii) Upon termination of the period for which the Schedule of Rates applies for any lot of the grain, and upon presentation of proper invoice, Commodity shall, subject to the right of offset provided in (i)(ii) above, pay all charges due and unpaid thereon unless the warehouse receipts were transferred with warehouse charges for the account of the purchaser.

(iv) In the event any invoice rendered by the warehouseman for services performed under this agreement has not been paid or returned for correction within 30 days after the date such invoice is received in the PMA Commodity Office, Commodity shall, upon demand of the warehouseman, make an advance to the warehouseman of not less than 90 percent of the amount of such invoice, if such advance shall be in excess of the amount due, the warehouseman shall repay the excess amount to Commodity. Any amount provisionally paid to the warehouseman for charges in connection with grain stored under this agreement to the properties that the quantity covered by such invoice bears to the quantity on which the provisional payment was determined. If such advance payment is not offset, any amount provisionally paid to the warehouseman shall repay the excess amount to Commodity.

(c) The warehouseman shall not make any charges for any services not covered by this agreement or the applicable Schedule of Rates [illegible] the grain unless such services or storing is performed upon written [illegible]

RECEIVED JUN 26 1950 FARM ADMINISTRATION

[redacted]

Warehouseman elects to terminate this agreement on any renewal date, and at the time of such termination there is stored in the warehouse grain which has not been stored for the complete period used in computing charges, the storage charges with respect to such grain, whether paid or not, shall be adjusted to the storage charges for such entire period in proportion to the part of such period during which such grain was stored.

23. DESCRIPTIVE HEADINGS - The descriptive headings of the various sections hereof were formulated and inserted for convenience only and shall not be deemed to affect the meaning or construction of any of the provisions hereof.

24. EXECUTION - This agreement shall be executed by duly authorized representatives of Commodity and the warehouseman, and shall not be amended or superseded except by written Agreement executed in the same manner as this agreement.

All reporting requirements of this agreement have been approved by, and subsequent reporting and record keeping requirements will be subject to the approval of the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

COMMODITY CREDIT CORPORATION

By [signature] DISTRICT MANAGER

ROOM 217 - 1114 COMMERCE STREET

(Title) DALLAS 2, TEXAS

SHANNON ELEVATOR

(Warehouseman)

JUN 1 1950

By O. L. Shannon

owner

(Title)

In presence of Dallas Mail Room

APPROVED

JUN 1 1950

U. S. DEPARTMENT OF AGRICULTURE
PRODUCTION AND MARKETING ADMINISTRATION
COMMODITY CREDIT CORPORATION

SCHEDULE OF WAREHOUSES
COVERED BY UNIFORM GRAIN STORAGE AGREEMENT NUMBER A74-1-000-515

WDS NO.	1. ELEVATOR KNOWN AS	2. LOCATION AND ADDRESS	3. RAILROAD ON WHICH LOCATED *	4. TOTAL CAPACITY OF ELEVATOR
8-7475	Elev. A	Sudan, Texas	Santa Fe	80,000 bu.
"	" C (Flat)	" "	" "	160,000 bu.
"	" D (Flat)	" "	" "	160,000 bu.

RECEIVED
JUN 16 1950

Signed O. L. Shannon
(WAREHOUSEMAN)

* Name of railroad over which corrier to which grain will be delivered for

COMMODITY CREDIT CORPORATION
Form 26
(1-25-51)

U. S. DEPARTMENT OF AGRICULTURE
PRODUCTION AND MARKETING ADMINISTRATION
COMMODITY CREDIT CORPORATION

BOND NO. 1315009

WAREHOUSEMAN'S BOND - STORAGE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, That the undersigned O. I. Shannon dba Shannon Elevator, Dulan, Texas (address) (hereinafter referred to as the Principal) as principal, and the National Surety Corporation, a corporation of the State of New York, as surety (hereinafter referred to as the Surety) with offices located in the County of Dallas, State of Texas, (location of the office of the Surety in the State where the warehouse is located) are held and firmly bound, unto Commodity Credit Corporation and to any agency or person who may be injured by a breach of the Agreement(s) hereinafter described, (hereinafter referred to as the Obligees), for their use, in the principal sum of Fifty Thousand Dollars ($ 50,000.00) for the payment of which well and truly to be made, the Principal and Surety bind themselves and their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITIONS OF THESE OBLIGATIONS ARE SUCH THAT

WHEREAS, The Principal has made application to Commodity Credit Corporation for a Uniform Grain Storage Agreement(s), copy(s) of which Agreement(s) with respect to a warehouse(s) located at Dulan, Texas (Elevator A, C, & D) is attached hereto as Exhibit(s)* and made a part hereof;

NOW, THEREFORE, if said Agreement(s) shall be executed this bond shall be effective from the date when the Agreement(s) is executed and shall continue in full force and effect until the 31st day of May, 19 52, and thereafter from year to year unless otherwise terminated or cancelled as hereinafter provided; but if the Principal shall well and truly perform and fulfill all of the undertakings, covenants, terms, conditions, and agreements of said Agreement(s) during the original term of said Agreement(s) and any renewal thereof, and during the life of any guaranty required under the Agreement(s), and shall well and truly fulfill and perform all other obligations as a warehouseman in connection with any commodity stored or handled under said Agreement(s), and all duly authorized modifications of said Agreement(s) that may hereafter be made, notice of which modifications to the Surety being hereby waived, then the obligations of the Principal and the Surety on this bond shall become null and void; otherwise said obligations shall remain in full force and effect;

*The copy(s) of such Agreement(s) executed on this bond must be appropriately identified as Exhibit(s) A, B, C, etc., and as instructed in the space provided on the face of the bond.

CCC-WAREHOUSE-WAREHOUSEMEN

PROVIDED, HOWEVER, that this bond is executed by the Surety and accepted by Commodity Credit Corporation upon the following express conditions, which shall become precedent to any right of recovery hereunder:

FIRST, Regardless of the number of years this bond shall continue in force and of the number of annual premiums that shall be payable or paid, the Surety shall not be liable hereunder to the Obligees on account of losses sustained in connection with commodity stored under said Agreement(s) for a larger amount in the aggregate than the amount of this bond.

SECOND, This bond may be cancelled at any time by the Surety by giving written notice to Commodity Credit Corporation of its intention to cancel this bond and all liability thereunder shall terminate 90 days after the date of the receipt of such notice, except the rights of the Obligees shall not be affected by such notice as to any claims arising hereunder, whether presented or not, before the effective date of such cancellation notice.

SIGNED, SEALED AND DATED this 24th day of May, 19 51

Shannon Grain & Elevator and/or
Commerce and Warehouse Company (SEAL)

By O. L. Shannon
(Name)

Owner and Manager
(Title)

National Surety Corporation (SEAL)

Patricia Hamel
(Name)

T. M. Delaney, Attorney in Fact

(NOTICE TO SURETY - Correspondence pertaining to amendment, renewal, or cancellation of this bond, should be directed to the Contracting Officer of Commodity Credit Corporation who signed the Agreement for Commodity Credit Corporation, and should refer specifically to the warehouse(s) involved and the location thereof.)

Bond

RECEIVED
Fort Commodity Office
JUN 11 1951
Storage & Handling Sec.
Dallas

District Court of the United States of America
Northern District of Texas

I, GEO. W. PARKER, Clerk of the District Court of the United States in and for the Northern District of Texas, do hereby certify the foregoing to be true and correct copies of Government's exhibits 1, 2 and 3, which were inadvertently omitted from the certified record mailed to you February 9, 1953; Together with a true and correct copy of the Stipulation filed this May 27th, 1953, all of which are mailed to the United States Court of Appeals, New Orleans, Louisiana, as a supplemental record in cause No. 780 Criminal, entitled United States of America as Plaintiff against O. L. Shannon as Defendant, as fully as the same remains on file and of record in said cause, in my office at Lubbock, Texas.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Court, at my office in the city of Lubbock, Texas in said District, this 27th day of May in the year of our Lord one thousand nine hundred and Fifty-Three and of American Independence the 177th year.

GEORGE W. PARKER,
(Seal) Clerk of said Court.
By OLIVE FLUKE,
Deputy.

[fol. 603] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,416

O. L. SHANNON

versus

UNITED STATES OF AMERICA

MINUTE ENTRY OF ARGUMENT AND SUBMISSION, DATED NOVEMBER 4, 1953—Omitted in Printing

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[fol. 604] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14416

O. L. SHANNON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Northern District of Texas

OPINION—Filed January 15, 1954

Before Hutcheson, Chief Judge, and Borah, and Rives, Circuit Judges

BORAH, Circuit Judge:

Appellant, O. L. Shannon, was tried and convicted in the district court by a judge and jury on an indictment drawn under Section 15 (c) of the Commodity Credit Corporation Charter Act, Public Law 806, 80th Congress, 62 Stat. 1070, 15 U. S. C. A. § 714m (c). Section 15 (c) of the Act pro-[fol. 605] vides: "Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof,

be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

The indictment in this case contained 47 counts, six of which were dismissed by the court on motion of the Government. The jury found the defendant guilty on the others and the court sentenced him to five years imprisonment on each of counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, and 46, to run concurrently as to those counts only. It also sentenced defendant to two years imprisonment on each of counts 24, 43, and 47, to run concurrently as to those counts, and ordered that the sentences on the first named 38 counts as a group and the sentences on the last three named counts as a group shall run separately and cumulatively and consecutively. The defendant was also fined $5,000 on each of counts 24, 43, and 47, but the execution of the sentences on said three counts was suspended and defendant was placed on probation for three years to commence after his liability under the above five year sentences on the 38 counts had been lawfully terminated and conditioned upon payment of the fines imposed within a specified period and his exercise of diligent and earnest efforts to make restitution to the Government [fol. 606] within the earliest reasonable time. All of the counts charged that the defendant did willfully, knowingly, and unlawfully steal, conceal, remove, dispose of and convert to his own use a described commodity (wheat or grain sorghum) which was then and there the property of the Commodity Credit Corporation, hereinafter referred to as the C.C.C. In each count the time and place of the particular offense and the quantity of grain were stated.

It affirmatively appears that there were three storage agreements between C.C.C. and appellant and that the latter, doing business as Shannon Elevator, is referred to in the agreements as the warehouseman. The last of these agreements was dated June 1, 1950, under the terms of which the appellant's storage facilities at Sudan, Texas, became subject to a single storage agreement, and all grain of C.C.C. stored in said facilities was deemed to be commingled, and the warehouseman was obligated at his own expense to take all necessary steps to keep it in condition, and to condition any that was deteriorating, to the extent that he had the

proper equipment. The agreement also required that the warehouseman "shall at all times maintain in the warehouse indicated on the warehouse receipts and in which the grain was originally deposited for storage a stock of grain of the quantity, class, grade, and quality which he is obligated to deliver under the warehouse receipts"; that the warehouseman "shall upon surrender of warehouse receipts representing the grain stored in such elevator(s) or [fol. 607] warehouse(s), when so requested by Commodity, deliver the grain"; and that all the grain accepted by the warehouseman for storage "shall be * * * loaded out and shipped as requested by the owner or other authorized person or agency * * *." There is no question here but that appellant loaded out, shipped, delivered and sold grain stored under the agreement without being "so requested by Commodity * * * or other authorized person or agency * * *."

Appellant contends: (1) That the court erred in denying his motions for judgment of acquittal because (a) the grain described in the indictment was his property under the grain storage agreement and he could not be guilty of a willful theft or conversion thereof and (b) the Government totally failed to produce any physical inventory of appellant's stocks or other tangible evidence of shortage and conversion of the aforesaid grain and (c) there was no showing made by the Government of appellant's intent to steal or convert the grain and there could have been no such intent because appellant had the legal right to sell it to avoid spoilage, and (2) that the court erred in denying a motion for a new trial on the ground of prejudicial and improper statements made by the United States Attorney and his assistant in their arguments to the jury.

Appellant's claim of ownership is bottomed upon the argument that under the grain storage agreement there was a sale of the grain to the warehouseman and not a bailment. [fol. 608] In the recent case of *Dawson v. United States*, 5 Cir. 203 F. 2d 201, this court had occasion to consider a C.C.C. grain storage agreement entered into in the State of Texas and in rejecting a like argument there advanced as wholly untenable we said: "The primary obligation of the warehouseman was to store, insure, load out, and ship, grain at the request of the holder of the warehouse receipts,

in whom was the legal title and ownership in common of these commodities;" and that the warehouseman "only held the grain in trust as bailee for the holders of the warehouse receipts." The uncontroverted evidence in this record shows that between 95 and 98 per cent of those receipts were held by C.C.C. and not appellant, and consequently as in the Dawson case we conclude that there was title in the C.C.C. to the commodities described in the indictment.

This brings us to the question as to whether there was evidence of shortage and conversion of the Government owned grain. J. W. Mize, an auditor with the office of Audit, Production and Marketing Administration, United States Department of Agriculture, testified that he took a physical inventory of the amount of grain in store in the Shannon Elevator on August 20 and 21, 1951, and found a shortage of 29,956,190 pounds of grain sorghum and 38,218.80 bushels of wheat. The Government witnesses N. K. Parrish, who was in the grain business at Lubbock, Texas, Harry Hitch, Assistant General Manager of Uhlmann Elevators Company, Fort Worth, Texas, and Hugh E. Corbin, Chief Accountant of Rock Island Grain Company, Fort Worth, Texas, [fol. 609] gave evidence of shipments of grain by appellant to their respective businesses and Corbin testified that appellant made further shipments to the Transit Grain Company at Fort Worth. These witnesses identified each shipment by date, car number, quantity and nature of grain shipped, the manner in which it was handled by the consignee, and the point from which shipped which in all instances was Sudan, Texas. P. M. Miller, Administrative Officer of the Production and Marketing Administration Commodity Office at Dallas, Texas, testified that C.C.C. ordered grain out of warehouses by means of loading orders and that his office is the only one which can give loading orders for grain stored in the State of Texas and owned by C.C.C. That no order of any kind was ever issued to Shannon Elevator to load out such grain to Parrish or to Uhlmann Elevators Company, or to Transit Grain Company, and that with one single exception not here pertinent no such order was issued to load out to Rock Island Grain Company. He further testified that C.C.C. ordered out all of its grain which was stored with Shannon Elevator, but the orders were not competely filled. John J. Bachmann, Chief of

Accounting Investigations in the Department of Agriculture, testified that he was in charge of the accounting investigation of the records and books of the Shannon Elevator for the years 1949, 1950, and 1951, particularly with respect to appellant's transactions in grain sorghum and wheat, and that appellant was never in a long position at any time after October 15, 1949. He stated, as of the date of each of the undismissed counts, what percentage of the [fol. 610] grain in storage in appellant's facilities belonged to C.C.C., and applying such percentages to the shipments established by the witnesses Parrish, Hitch, and Corbin, he stated the amount of grain in each shipment which was owned by C.C.C. The appellant, a witness in his own behalf, admitted that he was materially short, that he failed to deliver to C.C.C. all the grain for which it held warehouse receipts, and that he loaded out, shipped, and sold [1] grain to the aforementioned dealers and others. This disposes of the question of shortage.

The appellant next contends that the Government did not discharge its burden of proving that he "willfully" converted the grain. We think this issue was properly submitted to the jury under appropriate instructions and that there was evidence sufficient to convince a fair minded jury beyond a reasonable doubt that the requisite criminal intent was present. For example, appellant was unable to deny that on or about August 9, 1951, he certified to C.C.C. that he had a correct and just claim in the sum of $41,111.17

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[1] Appellant gave this testimony:

"Q. I will ask you if you said this in that statement: Following is a list of persons or concerns to whom I have sold Commodity Credit grain. They bought the bulk of this grain. There are others whose names I am unable to furnish. N. K. Parrish, broker, Lubbock, Texas. Transit Grain Company, Fort Worth, Texas; Rock Island Grain Company, Fort Worth, Texas. Uhlmann Elevators, Fort Worth, Texas. Sudan Livestock & Feeding Company, Sudan, Texas. Robstown Farm Commodities, Inc., Robstown, Texas.

"A. Well, I did sell them grain that I had stored for Commodity Credit."

for storage charges on 35,675,682 pounds of grain "on store," but the C.C.C. refused payment because its representatives "had been out there and couldn't get their [fol. 611] grain." This evidence of an ineffectual attempt by appellant to conceal his activities is consistent with the testimony of the Government auditor Mize [2] that appellant attempted to forestall the Government from measuring his inventory because of knowledge on his part that he had sold the grain and applied the proceeds to his own use. The facts of the case thus carry with them convincing evidence of the willful doing of the things which constitute the crimes charged. It follows that appellant's claim that he had a right to sell the grain "to prevent further spoilage" is a false issue which we need not labor here.

We have carefully considered appellant's contention that his motion for new trial should have been granted because of improper statements made by the United States Attorney and his assistant in their arguments to the jury. These statements, strictly speaking, overstepped the bounds. It is quite another thing to say that these statements constitute prejudicial error. In the first place, this was not a weak case and it is hard for us to imagine that the minds

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[2] Mize testified:

"Well, at that time he told me that he was short of grain and that he wondered if it wouldn't be possible for me to forget about measuring his inventory at that time and of course come back at a later date, * * *."

* * * * * * *

"Well, * * * it's a policy of our office after any time of audit, * * * to discuss the finding with the contractor, or in this case Mr. Shannon, and of course I pointed out to him the quantity of shortage which I determined, and of course he stated there that, he told me that the sales proceeds had gone into the warehouse construction and at the present time he would be unable to replace that shortage. He also stated that he contemplated at harvest time he would be able to acquire something like 15 million pounds of milo, and that with some time he could possibly clear himself of this condition, which was the shortage."

[fol. 612] of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, it does not appear that the court was requested to rebuke counsel or to charge the jury to disregard his remarks, both of which are usually considered proper practice in laying a predicate for an assignment of error.

On the whole case, it cannot be said that any substantial rights of the parties were affected by acts of the court and of counsel for the Government. 28 U.S.C.A. §2111; Fed. Rules Cr. Proc. rule 52 (a), 18 U.S.C.A.; *Meyer v. U. S.*, (C.C.A.) 258 F. 212; *Hunter v. U. S.*, (C.C.A.) 264 F. 831; *Billinglsey v. U. S.*, (C.C.A.) 274 F.86.

Since we find no prejudicial error in the record the judgment is affirmed.

[fol. 613] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,416

O. L. SHANNON,

versus

UNITED STATES OF AMERICA

JUDGMENT—January 15, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

No. 14,416

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

O. L. SHANNON, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

APPELLANT'S PETITION FOR REHEARING

Now comes the Appellant, O. L. Shannon, in the above styled and numbered cause, within the time prescribed by the Rules of this Honorable Court, and petitions this Honorable Court for a rehearing upon the following grounds:

GROUND I:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the record, the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the grain upon demand or pay for it at its cash value at the nearest terminal market. (Record, struction. (Record, pp. 506-507).

GROUND II:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the contract of storage between Appellant and Commodity Credit Corporation, the parties, by their actions and conduct in dealing with each other thereunder, had interpreted the contract to mean that Appellant had the right under the contract to either return the grain in like quantity and quality or to pay its value in cash as determined at the nearest terminal market, it being a well recognized rule of law that in construing a contract the interpretation placed upon that contract by the mutual consent and actions of the parties shall govern its construction (Record, pp. 506-507).

GROUND III:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the same quantity and quality of grain that had been stored or return any other grade of merchantable grain and pay the difference in cash. (Record, pp. 506-507.)

GROUND IV:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when the contract of storage contained, in paragraph 15 thereof, a provision declaring the warehouseman, Appellant here, to be the owner of the grain stored under that contract and required him to carry insurance on all stored grain in his own name and not as a bailee or trustee for others, and required him to account only for the *value* of grain destroyed, regardless of the amount of insurance carried or collected by him. (Record, p. 507.)

GROUND V:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because regardless of the terms of the contract, and the conduct of the parties by which they interpreted the contract, under Article 5645, Revised Civil Statutes of Texas, there could have been no intent to steal or convert the property in question by selling it to prevent spoilage, as a matter of law. (Record, pp. 176 and 506-510.)

GROUND VI:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because the Government did not prove conversion or theft by appellant of any grain described in the indictment. (Record, pp. 506-510.)

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GROUND VII:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because the Government failed to prove any actual physical shortage of grain on any date mentioned in any count of the indictment. (Record, pp. 507-508.)

GROUND VIII:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the record, all government witnesses had admitted that they did not actually know how much grain this Appellant had in his warehouses on the various dates mentioned in the indictment and that the only physical inventory they had of his grain in storage was taken long after the periods covered by the allegations of the various counts of the indictment. (Record, pp. 507-508.)

GROUND IX:

This Honorable Court erred in sustaining the trial court's action in overruling Appellant's Motion for New Trial which should have been granted because of the vindictive, prejudiced, false, and improper statements made by the United States Attorney and his assistants in their arguments to the jury, which statements were not supported by the record and were highly inflammatory and prejudicial to Appellant and influenced the jury to return its verdict of guilty. (Record, p. 36.)

GROUND X:

This Honorable Court erred in not holding that the *grain described in the indictment was the property of Appellant*, because under the "Uniform Grain Storage Agreement", which had been drawn by Commodity Credit Corporation and must be construed strictly as to it, such grain might be returned by Appellant upon demand or he might, at his option, pay its cash value at the nearest terminal market; and sale of the grain by Appellant could not be a willful theft or conversion. (Raised by Motion for Judgment of Acquittal, Record pp. 506-7.)

GROUND XI:

This Honorable Court erred in not holding that Appellant's option to return grain of like quantity and quality or pay its cash value *had been recognized and practiced by the parties to the contract* and that such contract should be construed to mean *what the parties had interpreted it to mean* by their conduct and actions in dealing with each other under the contract. (Raised by Motion for Judgment of Acquittal, Record pp. 506-7.)

GROUND XII:

This Honorable Court erred in not holding that, under the contract, Appellant was permitted to either return the same quantity and quality of grain that had been stored or to return any other merchantable grain and pay the difference in cash, and that under such a contract the stored grain was, as a matter of law, "the property of" Appellant; and his sale of such

grain could not be a willful theft or conversion. (Raised by Motion for Judgment of Acquittal, Record pp. 506-507.)

GROUND XIII:

This Honorable Court erred in not holding that the contract in question, by way of further clarification, contained a specific provision designating the warehouseman as owner of the grain by requiring him, as such owner, to carry insurance on all stored grain *in his own name*, not as bailee or trustee for others, and requiring him to account for *the value* of all grain destroyed, regardless of the amount of insurance carried or collected by him; such provision thus conforming to the other provisions of the contract showing ownership of the grain to be in Appellant. (Raised by Motion for Judgment of Acquittal, Record p. 506.)

GROUND XIV:

This Honorable Court erred in not holding that regardless of the above described provisions of the contract, and the conduct of the parties by which they so interpreted the contract, *there could have been no intent to steal or convert the property in question as a matter of law because Shannon had the legal right to sell said grain to avoid further spoilage under* Article 5645, Revised Civil Statutes of Texas. (Raised by Evidence, Record pp. 181 to 230, and by Motion for Judgment of Acquittal, Record pp. 176 and 509-10.)

GROUND XV:

This Honorable Court erred in not holding that the government totally failed to produce any physical inventory of Shannon's stocks or other tangible evidence of conversion of the grain described in the indictment. (Raised by Motion for Judgment of Acquittal, Record pp. 507-509.)

GROUND XVI:

This Honorable Court erred in not holding that prejudicial and material errors were committed by the prosecuting attorneys in argument of counsel on the trial of the case before a jury. (Raised by Motion for New Trial, Record p. 34, and by objections made during the Argument, Record pp. 513, 516, 521, and 550-51.)

GROUND XVII:

This Honorable Court erred in holding that the issue of "willfully" converting the grain in question was properly submitted to the jury; because under Article 5645 of the Revised Civil Statutes of Texas (see Appendix to Appellant's Brief) and the uncontroverted evidence of spoilage and notice thereof to Commodity Credit Corporation, the issue as to intent, that is, as to whether there was a "willful" conversion, was a question of law and not of fact; and, under such state of the record, there could have been no such criminal intent as a matter of law.

WHEREFORE, Appellant respectfully petitions this Honorable Court to set aside its judgment heretofore

entered herein and to grant him a rehearing; and, upon such rehearing, set set aside said judgment and render judgment herein for Appellant, or, in the alternative, to remand said cause to the trial court for a new trial.

Respectfully submitted,

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and

CADE & BOWLIN
709 Lubbock National Building
Lubbock, Texas
Attorneys for Appellant

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Appellant's Petition for Rehearing has been mailed to Hon. Heard F. Floore, United States Attorney for the Northern District of Texas, by registered mail addressed to him at his office in the Federal Courthouse, at Fort Worth, Texas, simultaneously with the filing of the originals hereof with the Clerk of this Court.

One of Appellant's Attorneys

[fol. 622] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,416

[Title omitted]

ORDER DENYING REHEARING—February 3rd, 1954

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 623] Clerk's Certificate to foregoing transcript omitted in printing.

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HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. T. MILLER,
JAMES O. CADE,
Counsel for Petitioner.

KENNETH BOWLIN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON,

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vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner, O. L. Shannon, was tried and convicted in the United States District Court for the Northern District of Texas, Lubbock Division upon an indictment drawn under Section 15 (2) of the Commodity Credit Corporation Act,

Public Law 806, 80th Congress, 62 Stat. 1070, 15 U. S. C., par. 714 m (c) reading as follows:

> "Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

The indictment filed March 28, 1952 (Record p. 1) in this case contained 47 counts, six of which were dismissed by the court on motion of the Government. The jury found the defendant guilty on the others. The court, on January 9, 1953, sentenced him to five years imprisonment on each of counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, and 46, to run concurrently as to those counts only. It also sentenced defendant to two years imprisonment on each of counts 24, 43 and 47, to run concurrently as to those counts, and ordered that the sentences on the first named 38 counts as a group and the sentences on the last three named counts as a group shall run separately and cumulatively and consecutively. The defendant was also fined $5,000 on each of counts 24, 43, and 47, but the execution of the sentences on said three counts was suspended and defendant was placed on probation for three years to commence after his liability under the above five year sentences on the 38 counts had been lawfully terminated and conditioned upon payment of the fines imposed within a specified period and his exercise of diligent and earnest efforts to make restitution to the Government within the earliest reasonable time. All of the counts charged that the defendant did willfully, knowingly, and unlawfully steal, conceal, remove, dispose of, and convert to his own use a

described commodity (wheat or grain sorghum) which was then and there the property of the Commodity Credit Corporation, hereinafter referred to as the C. C. C. In each count the time and place of the particular offense and the quantity of grain were stated.

An appeal from said judgment was taken by O. L. Shannon to the United States Court of Appeals for the Fifth Circuit, at New Orleans, which affirmed the judgment of the United States District Court.

The principal questions involved on said appeal were raised by Petitioner, Appellant below, as follows:

1. The *grain described in the indictment was the property of Appellant,* because under the "Uniform Grain Storage Agreement", which had been drawn by Commodity Credit Corporation and must be construed strictly as to it, such grain might be returned by Appellant upon demand or he might, at his option, pay its cash value at the nearest terminal market; and sale of the grain by Appellant could not be a willful theft or conversion. (Raised in trial court by Motion for Judgment of Acquittal, Record p. 506-7.)

2. That Appellant's option to return grain of like quantity and quality or pay its cash value *had been recognized and practiced by the parties to the contract* and that such contracts should be construed to mean *what the parties had interpreted it to mean* by their conduct and actions in dealing with each other under the contract. (Raised in trial court by Motion for Judgment of Acquittal, Record pp. 506-7.)

3. That, under the contract, Appellant was permitted to either return the same quantity and quality of grain that had been stored or to return any other merchantable grain and pay the difference in cash, and that under such a contract the stored grain was, as a matter of law, "the property of" Appellant; and his sale of such grain could not be a willful theft or conversion. (Raised in trial court by Motion for Judgment of Acquittal, Record pp. 506-507.)

4. That the contract in question, by way of further clarification, contained a specific provision designating the warehouseman as owner of the grain by requiring him, as such owner, to carry insurance on all stored grain *in his own name,* not as bailee or trustee for others, and requiring him to account for *the value* of all grain destroyed, regardless of the amount of insurance carried or collected by him; such provision thus conforming to the other provisions of the contract showing ownership of the grain to be in Appellant. (Raised in trial court by Motion for Judgment of Acquittal, Record p. 506.)

5. That regardless of the above described provisions of the contract, and the conduct of the parties by which they so interpreted the contract, *there could have been no intent to steal or convert the property in question as a matter of law because Shannon had the legal right to sell said grain to avoid further spoilage under Article* 5645, Revised Civil Statutes of Texas. (Raised in trial court by Evidence, Record pp. 181 to 230, and by Motion for Judgment of Acquittal, Record pp. 176 and 509-10.)

6. That the government totally failed to produce any physical inventory of Shannon's stocks or other tangible evidence of conversion of the grain described in the indictment. (Raised in trial court by Motion for Judgment of Acquittal, Record pp. 507-509.)

7. Prejudicial and material errors were committed by the prosecuting attorneys in argument of counsel on the trial of the case before a jury. (Raised in trial court by Motion for New Trial, Record p. 34, and by objections made during the Argument, Record pp. 513, 516, 521, and 550-51.)

All of these questions were decided and resolved against Petitioner O. L. Shannon by said United States Court of Appeals on January 15, 1954, and materially affected the determination of said appeal; except that said United States Court of Appeals did not discuss but ignored questions Nos. 2, 3, and 5, enumerated above, regardless of the fact that

said questions were supported with uncontroverted evidence and which evidence was never denied or claimed to be controverted by Respondent either in the record or in its Briefs.

Petitioner filed his "Appellant's Petition for Rehearing" in said United States Court of Appeals on January 27, 1954, and the same was by that Court overruled, without opinion, on February 3, 1954.

II

Reasons Relied On for Allowance of the Writ

1. The great importance of the statute (15 U. S. C. A. par. 714 m (c),) as related to Section 34 of the Uniform Warehouse Receipts Act (Art. 5645, Revised Civil Statutes of Texas) in the light of the "Uniform Grain Storage Agreement" used throughout the United States by Commodity Credit Corporation, to the business world, public warehousemen, and the legal profession, and the need of an authoritative and elucidating decision, particularly as to the penal provisions of the Act.

2. The decision of the United States Court of Appeals in this case under a decision of the Supreme Court of the United States in the case of *Fayerweather* v. *Rich* (195 U. S. 276-277), should be reviewed by this court because, in this case, the United States Court of Appeals has deprived Petitioner of his rights under the "due process clause" of the 5th Amendment to the Constitution of the United States, by giving an unreasonable, untenable and unwarranted effect to Article 5645 of the Revised Civil Statutes of Texas, a local law, said statute reading as follows:

"Art. 5645. *Perishable or dangerous goods*

> "If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be

liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644. Id. Sec. 34."

The uncontroverted, and undisputed, evidence was as follows: The records of United States Department of Agriculture licensed grain inspectors disclosed that 39.8% of all milo shipped by Petitioner during 1951, the period involved, was "musty" (Record pp. 414-415). All wheat shipped by Petitioner in 1951 was 65.6% musty (Record p. 414). Musty grain carries the grade of "sample" (Record p. 114) and "sample" grade is the lowest grade of grain (Record p. 113). The undisputed testimony is that when grain starts deteriorating in a particular warehouse, the whole of the stored grain *must be moved* or the spoilage will spread to all of the grain and destroy it (Record p. 111).

The witnesses Henry Stanley (Record p. 181), Charlie Steel (Record p. 186), Charlie H. Steel (Record p. 195), Gilbert Churchman (Record p. 207), Pete Thompson (Record p. 126), and Forrest D. Churchman (Record p. 226), all testified that the grain in Shannon's warehouses was rotting rapidly in 1951, just prior to the dates named in the indictment. They said the grain had completely rotted to a depth of from six inches to two feet in the bottoms of Shannon's

warehouses at that time. The grain-rot was rapidly spreading up from the floor to the top layers of grain. They testified that the warehouses were flooded on June 4, 1951, which made the situation worse.

Petitioner notified Commodity Credit Corporation of this condition by letter (Record p. 349). Mr. Stuart of Commodity Credit Corporation was personally present and actually saw the rotten condition of the grain (Record p. 278). The Government made no attempt to offer a single line of evidence to controvert the above described testimony. Nowhere have they contended they met it.

The refusal of the United States Court of Appeals to even consider or discuss the record thus presented constitutes an unwarranted, untenable and unreasonable disregard for the rights of Petitioner, (who was acting within the Texas Statute) under the due process clause of the 5th Amendment and is a sufficient ground for the exercise of its supervisory powers by the Supreme Court of the United States.

3. The United States Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings, and sanctioned a like departure by the trial court, so as to call for an exercise of the power of supervision of the Supreme Court of the United States, in holding that the issue as to whether Shannon "willfully" converted the grain in question was properly submitted to the jury, *when that issue was a clear question of law only;* because under Article 5645 of the Revised Civil Statutes of Texas (quoted verbatim in 2 above) and the uncontroverted evidence of grain spoilage together with written notice thereof to Commodity Credit Corporation, the issue as to intent, that is, as to whether there was a "willful" conversion depended not upon any issue of fact (there being no dispute as to said facts) but entirely upon the construc-

tion and validity of said statute (said statute being identical with Section 34 of the Uniform Warehouse Receipts Act). The evident intent of this Petitioner to follow the provisions of said Article 5645 being uncontroverted, there could have been no intentional criminal conversion or theft of the spoiling grain disposed of by him.

The United States Court of Appeals departed quite radically from the accepted and usual procedure in disposing of the issue without fairly discussing or passing upon it. Such departure was very material in deciding the case.

4. The decision of the United States Court of Appeals in holding that Shannon "only held the grain in trust as bailee for the holders of the warehouse receipts" is a decision of a question of local law in a way probably in conflict with applicable local decisions.

5. The decision of said United States Court of Appeals in holding that Shannon "only held the grain in trust as bailee for the holders of the warehouse recipts" is an erroneous decision of an important question of general law and is in conflict with the weight of authority.

6. The decision of said United States Court of Appeals holding Shannon to be guilty of conversion and theft under the Commodity Credit Corporation Act, when, under the record, the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Shannon to either return the grain upon demand or pay for it at its cash value at the nearest terminal market is an erroneous decision of an important question of general law and is in conflict with the weight of authority.

7. The decision of said United States Court of Appeals holding Shannon to be guilty under said Act, when, under the contract of storage between Shannon and Commodity Credit Corporation, the parties, by their actions and con-

duct in dealing with each other thereunder, had interpreted the contract to mean that Shannon had the right to either return the grain in like quantity and quality or to pay its value in cash at the nearest terminal market, or return grains of lower quality and pay the difference in cash, is in conflict with the decision of the Supreme Court of the United States in the case of *District of Columbia* v. *Gallaher,* 124 U. S. 505.

8. The decision of said United States Court of Appeals holding Shannon to be guilty of conversion under the Act, when the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which, as fully admitted by government witnesses, permitted Shannon to either return the same quantity and quality of grain that had been stored or return any other grade of merchantable grain and pay the difference in cash, is an erroneous decision of a question of general law and is in conflict with the great weight of authority.

9. The decision of said United States Court of Appeals "that Appellant's claim that he had a right to sell the grain 'to prevent further spoilage' is a false issue," when the evidence is uncontroverted that he did that very thing under Article 5645 Revised Civil Statutes of Texas (Sec. 34, Uniform Warehouse Receipts Act), so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

10. The decision of the United States Court of Appeals overruling Shannon's contention that his Motion for New Trial should have been granted because of improper statements made by the United States Attorney and his assistant in their arguments to the jury, when said court admits in its decision that "These statements, strictly speaking, overstepped the bounds," so far departs from the usual

and accepted course of judicial proceedings, as to call for an exercise of this court's power of supervision.

III

Your Petitioner presents to this court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Court of Appeals for the Fifth Circuit.

IV

Petitioner further prays that, pending the disposition of his case by this court, he may be admitted to bail upon giving bond according to law in such sum as this court may deem proper, the bond to be approved by the Clerk of the United States Court of Appeals, for the Fifth Circuit, or otherwise as this court may direct.

WHEREFORE, Your Petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket, No. 14,416, O. L. Shannon, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of the said United States Court of Appeals be reversed by the court, and for such further relief as to this court may seem proper.

E. T. MILLER,
JAMES O. CADE,
Counsel for Petitioner.

KENNETH BOWLIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Courts Below

The opinion in the United States Court of Appeals for the Fifth Circuit has not, as of the date of preparation hereof, been published. Said opinion is found in the record of proceedings from said United States Court of Appeals and was rendered by that Court on January 15, 1954.

Jurisdiction

1. The date of the judgment to be reviewed is January 15, 1954. Petition for Rehearing was filed on January 27, 1954 and was overruled on February 3, 1954.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Title 28 U. S. C. 1254, Section 1; 62 Stat. 928.

3. The facts showing that the nature of the case and rulings of the court below are such as to bring this case within the jurisdictional provision relied upon, are recited above under Section II of the foregoing Petition for Writ of Certiorari, which is adopted and made a part hereof.

4. The cases believed to sustain said jurisdiction are as follows:

Warner v. *New Orleans,* 167 U. S. 467;
The Three Friends, 166 U. S. 1;
Forsyth v. *Hammond,* 166 U. S. 506;
Hiatt v. *Brown,* 339 U. S. 103;
Stack v. *Boyle,* 342 U. S. 1.

Statement of the Case

This has already been stated in the preceding petition under Section I, p. 1 et seq., which statement is hereby adopted and made a part of this brief.

Specification of Errors

I

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when, under the record, the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the grain upon demand or pay for it at its cash value at the nearest terminal market (Record, pp. 506-507).

II

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion

for Judgment of Acquittal when, under the contract of storage between Appellant and Commodity Credit Corporation, the parties, by their actions and conduct in dealing with each other thereunder, had interpreted the contract to mean that Appellant had the right under the contract to either return the grain in like quantity and quality or to pay its value in cash as determined at the nearest terminal market, it being a well recognized rule of law that in construing a contract the interpretation placed upon that contract by the mutual consent and actions of the parties shall govern its construction (Record, pp. 506-507).

III

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal when the grain he had sold, as described in the indictment, had been stored with him by Commodity Credit Corporation under a contract which permitted Appellant to either return the same quantity and quality of grain that had been stored or return any other grade of merchantable grain and pay the difference in cash. (Record, pp. 506-507.)

IV

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion for Judgment of Acquittal because regardless of the terms of the contract, and the conduct of the parties by which they interpreted the contract, under Article 5645, Revised Civil Statutes of Texas, there could have been no intent to steal or convert the property in question by selling it to prevent spoilage, as a matter of law. (Record, pp. 176 and 506-510.)

V

The United States Court of Appeals erred in sustaining the trial court's action in overruling Appellant's Motion

for New Trial which should have been granted because of the vindictive, prejudiced, false, and improper statements made by the United States Attorney and his assistants in their arguments to the jury, which statements were not supported by the record and were highly inflammatory and prejudicial to Appellant and influenced the jury to return its verdict of guilty. (Record, p. 36.)

Point 1.

Under Article 5645, Revised Civil Statutes of Texas, there could have been no intent to steal or convert the stored grain by selling or otherwise disposing of it to prevent further damage and spoilage. (Record pp. 176 and 506-510.)

Authorities

Article 5645, Revised Civil Statutes of Texas;
Title 15, Sec. 714 m (c) U. S. C.

Summary Statement and Argument

There is no showing of intent made out by the government in this case, as a matter of law. Under Title 15, Sec. 714 m (c) U. S. C., intent is an integral part of the offense. The government had the burden of proving that defendant "willfully" stole or converted the grain. It did not discharge that burden as we will show in this portion of our brief.

Again, we call attention to the fact that from the records of the licensed grain inspectors, 39.8% of all milo shipped during the period was "musty" (Record pp. 414-415). All wheat shipped in 1951 was 65.6% musty (Record p. 414). Musty grain carries the grade of sample (Record p. 114) and sample grade is the lowest grade of grain (Record p. 113). The undisputed testimony is that when grain starts deteriorating in a particular warehouse, the whole of the

stored grain must be moved or the spoilage will spread to all the grain and destroy it (Record p. 111).

The witness Henry Stanley (Record p. 181), Charlie Steel (Record p. 186), Charlie H. Steel (Record p. 195), Gilbert Churchman (Record p. 207), Pete Thompson (Record p. 216), and Farrell D. Churchman (Record p. 226) all testified that the grain in Shannon's warehouses was in bad condition in 1951, just prior to dates named in the indictment. They said that on the floor of the warehouses the grain had completely rotted to a depth of six inches to two feet. They further testified that the grain above this rotten bottom layer was deteriorating rapidly. They testified that the warehouses were flooded on June 4, 1951, which made the situation worse. Typical of their description of this grain was the testimony of Charlie Steel (Record pp. 188-189):

"Q. In terms of pounds, do you know how much rotten grain was in that warehouse?

"A. No, I wouldn't know just how much it was in there.

"Q. Did you help remove that rotten grain?

"A. Not out of that barn, no sir.

"Q. Did you help remove it out of another one?

"A. Yes, sir.

"Q. When was that?

"A. That was in May.

"Q. Well, how deep was it in that barn?

"A. In '51. Well, I would say it was, averaged, oh, around ten inches deep in that barn.

"Q. That was in May, that was before the flood; is that right?

"A. Yes, sir.

"Q. Did you ever in your time you were working out there, did you ever unload any warehouse, remove the grain from any of those warehouses where the grain was good all the way to the floor?

"A. No, sir.

"Q. What did you always find?

"A. Rotten grain on the bottom.

"Q. From what depth?

"A. I would say if a man would average the barns all up that I worked in, it would average around 12 inches deep."

After the flood on June 3rd or 4th, 1951, Henry Stanley (Record p. 182) says:

"Q. Did you work for him after the flood?

"A. Yes, sir.

"Q. All right. Now, what kind of work did you do out there after the date of June the 3rd, 1951, for Mr. Shannon? Where did you work?

"A. I helped move a little grain.

"Q. In the warehouses or where?

"A. Yes, sir.

"Q. Mr. Stanley, did you see, in moving that grain out of the warehouse, what did you find there at the bottom of the grain, when you got down to it?

"In barn D?

"Q. Wherever you worked there.

"A. There was grain from knee deep, from six inches to knee deep, just as black as it could be, rotten.

"Q. Was what?

"A. Grain knee, six inches deep to knee deep, black, rotten.

"Q. In the bottom of the barn?

"A. Yes, sir.

"Q. What did you do with that? What was done with that grain?

"A. It was left in the barn at that time.

"Q. Well, did you take it out?

"A. I don't know. It was in there when I quit.

"Q. You didn't help move it out?

"A. No, sir.

"Q. What shape was the grain in just before that knee-deep stuff?

"A. Well, it was damaged a whole lot.

"Q. Where was the good grain?

"A. Right on top.

"Q. Was there good grain on top?

"A. Yes, sir.
"Q. And then this badly damaged and then on the bottom what you call rotten grain?
"A. That's right.
"Q. And you say it was from six inches to knee deep?
"A. Yes, sir.
"Q. All over that barn?

"Mr. Binion:

"Did you say it was all over the barn or not?
"A. Yes.
"Q. Now, Mr. Stanley, could you turn the grain in that warehouse?
"A. No, sir.
"Q. Why couldn't you turn it?
"A. Didn't have no place to put it.
"Q. Did you have any facilities at all for turning it?
"A. No, sir.
"Q. If you had turned it, where would you have, what would you have had to have done with it?
"A. I don't know what you'd done with it.
"Q. Had to put it outside the barn?
"A. Yes, sir."

Shannon notified Commodity by letter as to this condition (Record p. 349). Mr. Stuart of Commodity Credit was present and actually saw the rotten condition of the grain (Record p. 278).

Mr. Shannon had to move this deteriorating grain immediately and get all of it out of the warehouses or it would have all rotted (Record p. 111). He was but following the Texas Law when he did move it out and sell it. Article 5645 of the Revised Civil Statutes of Texas reads as follows:

> "*If goods are of a perishable nature, or by keeping will deteriorate greatly in value,* or by their odor, leakage, inflammability, or explosive nature, *will be liable to injure other property,* the warehouseman may give such notice to the owner, or to the person in whose name the

goods are stored, *as is reasonable and possible* under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, *the warehouseman may sell the goods at public or private sale without advertising.* If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644. Id. Sec. 34."

In view of the *uncontradicted and overwhelming evidence* in this record of deteriorated grain and the language of the above statute, how could there have been any criminal intent in the sale of these 41 cars of grain? Certainly the evidence of musty grain from the records of the Lubbock Grain Exchange and the Fort Worth Grain Exchange, of grades made by licensed grain inspectors mentioned above, is conclusive as to the bad condition of grain shipped in 1951 by Shannon (Record pp. 414-415 and 114).

The witness, John A. Bramlett, contracting officer for Commodity Credit Corporation, testified that he made the contracts for storage of grain *without any inspection whatever* of Shannon's storage plant and facilities (Record p. 65) and that all he knew about such facilities was Shannon's description of them in his application.

The Receiver, Thruston Bowers, testified (Record pp. 72 to 74) that the warehouses, where the grain had been stored, were dirt floors with a scattering of asphalt laid thereon. Bowers further testified that, in order to keep linters cotton he was storing in the warehouses from rotting, he used "dunnage" to hold the cotton up off of these dirt floors.

The government witness Charles C. Weaver, Jr., testified (Record p. 95) that there was no physical inventory of the

grains stored at the Shannon facilities at any time. The same witness admitted (Record p. 99-100) that, aside from an attempt to reconstruct an inventory from existing records, the only way to have determined the amount of grain on hand, on the dates named in the indictment was to have either weighed the grain or determined the cubic content of grain on hand and then reduce it to pounds. Neither of these methods were ever followed by Commodity Credit. Weaver finally stated (Record, bottom of p. 101), that he was not telling the jury how much grain Shannon had on hand on "any of these dates".

The government witness Bachmann made it clear that there had never been an inventory or check-up of grain stored with Shannon (Record pp. 171-172).

The government witness, N. K. Parrish, testified (Record p. 110) that he could not have slept at nights if he had grain stored in such warehouse facilities as those owned by Shannon. Parrish had been in the grain business ten to twelve years. (Record p. 107.)

Harry Hitch, another government witness, had been in the grain business 25 years. Mr. Hitch testifies (Record p. 123) that facilities such as Shannon was operating was not a proper place to store grain. He testified that he would place grain in such storage only "if I had to" and that he would leave it there no longer than he "had to". (Record p. 124.)

The witness, J. V. Boulden, a farmer who had stored milo in his granary built exactly as Shannon's warehouses were built during the same period of time involved here, testified that he stored 240,000 pounds of milo in the fall of 1950 and that it shrunk to a weight of 222,640 pounds by March 1951, a loss by shrinkage of 17,360 pounds (Record pp. 260-261).

Again, (Record pp. 350 to 352) Shannon told how he had notified Commodity on one occasion in 1950 that grain was going out of condition and they waited six weeks to give him

a loading order and a lot of it was further damaged in that period of waiting. Then he again testifies that, in 1951, he notified Commodity of the deteriorated condition and the peril of further damage.

Mr. Shannon was a Texas warehouseman and had a right to rely on Texas Warehouseman's Law as stated in the above Article 5645.

The grain was rotting in his warehouses, at least one representative of Commodity actually saw the condition, and Shannon wrote Commodity about it (Record p. 349). He had to move all of the grain quickly or it would all have rotted (Record pp. 110 and 124). He had a right to do exactly what he did do under Article 5645. He could not be a willful law violator when he was trying to follow the statute.

How can it be said that he did not give such notice "as is *reasonable and possible* under the circumstances"? If Commodity did not receive the letter that Shannon wrote, proof of that fact undoubtedly would be in the Record. It is not there. The burden was on the government and not on Shannon. There is not a line of evidence in the record to refute the evidence of deterioration and spoilage. Nor is there a line to refute the evidence of notice given by letter and in person.

How can there, as a matter of law, be a willful or intentional conversion or theft under such a situation of law and fact? There was no issue to go to the jury and the United States Court of Appeals found there was a jury issue without any basis, either in law or in fact; and in so doing departed from the usual and accepted course of judicial proceedings so as to call for exercise of supervisory power by this Court.

Point II

Where Petitioner owned grain stored in his warehouse, under a contract, as well as under the construction placed

upon said contract by all the parties including the depositor of the grain, Petitioner's sale of such grain could not be a willful conversion or theft.

Summary Statement of Facts under Point II

The *Uniform Grain Storage Agreement* under which Mr. Shannon accepted grain for storage from Commodity Credit Corporation is the sole basis for the government's case here. It was offered in evidence by the government. (Record p. 59.) We wish to particularly call certain provisions of that contract to the attention of the court (Government Exhibit 3, Supplemental Record).

Under Section 21 of the contract "the terms of this agreement * * * shall prevail over the written or printed terms of the warehouse receipts representing the grain." Under Section 6 of the contract "all the grain stored in the warehouse shall be deemed to be stored commingled with other grain", unless otherwise specifically authorized.

Section 11 clearly makes provision for settlements *on the basis of value* "if the warehouseman notifies Commodity that he cannot load out the uniform grade and quality called for by the loading order." Section 11 also provides that Commodity may reject shipments made to it, if they are not merchantable grain, that is if the grain is not acceptable.

We particularly call attention to paragraph 13 of the "Uniform Grain Storage Agreement", Government's Exhibit 3, which reads as follows:

> "13. Settlement for Load Out—(a) Settlement with respect to each individual warehouse for differences in value between the grain loaded out and the grain described on the warehouse receipts and accompanying documents or on the certificates provided for in section 9(b) shall be made in accordance with this section: Provided, That:
>
> (i) In the case of warehouses at locations where official weights and grades *are available,* Commodity

shall have the election to reject grain not meeting the applicable requirements of section 11, and the warehouseman shall not be given credit for loading out the quantity of grain rejected. *If the grain is rejected at destination, Commodity shall sell such grain for the account of the warehouseman unless the warehouseman has requested that rejected grain be held for his account.* Rejection at destination shall be on the basis of official grades at the loading warehouse location.

(ii) In the case of warehouses at locations where official weights and grades *are not available,* Commodity shall have the election to reject grain not meeting the applicable requirements of section 11, *but the warehouseman shall pay Commodity the value of the grain which should have been delivered rather than replacing such rejected grain. Commodity shall sell rejected grain for the account of the warehouseman unless the warehouseman has requested that rejected grain be held for his account.*

(b) Subject to the provisions of Section 11, *the warehouseman and Commodity shall make settlement with respect to each loading order for the difference between the value of the quantity and quality of the commingled grain which is loaded out by the warehouseman from locations where official weights and grades are available and which is accepted by Commodity, and the grain described on the warehouse receipts and accompanying documents* surrendered by Commodity or on the certificates provided for in section 9 (b), *on the basis of cash prices current in the applicable terminal market* as of the date of inspection of the final shipment under the applicable order to load out, except that the warehouseman shall not receive any credit for over-delivery in quality as between loading orders.

"(c) Subject to the provisions of Section 11, the warehouseman and Commodity shall make settlement for the difference between the value of the quantity and quality of the commingled grain which is loaded out by the warehouseman from locations where official

weights and grades *are not available* and which is accepted by Commodity, and the grain described on the warehouse receipts and accompanying documents surrendered by Commodity or on the certificates provided for in Section 9(b), *on the basis of cash prices current in the applicable terminal market as of the date the final shipment* under the applicable order to load out is accepted by the carrier; Provided, That, the warehouseman shall be allowed a quantity tolerance of ⅛ of one per cent on the gross loading weight of short weight cars with respect to which the official report of the condition of the car shows evidence of actual loss. The value of overdeliveries in quality of each kind of grain shall be applied against the value of underdeliveries in quality of the same kind of grain until all grain of each year's crop has been shipped, sold, or otherwise disposed of, or during such period of time as may be mutually agreed upon, *except that the value of any underdelivery in quality of grain delivered which is determined to be of sample grade shall not be eligible for offset.* The value of any overdelivery in quality not so offset in making settlement for the year's crop, or during such agreed period of time, whichever is applicable, shall be dropped."

This contract provision was interpreted by the Government witness Charles C. Weaver, Jr., on cross-examination (R. pp. 440-441), in the following language:

"Q. You are the same witness, same Weaver is what I wanted to get at. I believe a while ago you testified that during the year 1951 that 115 cars, sample grade, were shipped by Shannon to Commodity Credit; is that right?

"A. Yes, sir.

"Q. And I believe you testified that 40 of those were accepted; is that right?

"A. Yes, sir.

"Q. That means that 75 out of the 115 cars shipped were rejected, doesn't it, were not accepted?

"A. That's correct, although they were rejected.

"Q. When you testify there about certain cars being sold for account of Shannon, those cars are cars that have been rejected and they are down there drawing demurrage, and you just wire him and say that they are rejected and ask him whether you can sell them or whether he wants them; *and if he tells you to sell them, you sell them and apply the money against his account, isn't that right?*

"A. *Well, it's a little more than that.*

"Q. Well, why don't you tell us all about it?

"A. Well, I personally keep the books and don't handle these wires or telephone conversations. It's done in another division of our office, and the men are here. But the way it happens is that, as I understand it, is that the car is graded at the first inspection point, which is normally Lubbock, and the various arrangements are entered into with warehousemen relative to the handling of sample grade cars.

"Under the contract the first election as to acceptance or rejection of the cars is with Commodity Credit Corporation. The second election is with the warehouseman. He can elect to have the grain returned to him *or he can elect to have Commodity handle the grain for his account.*

"Now, *when he elects for us to handle the grain for his account, he is given credit for the quantity of grain as well as for the proceeds of the sale;* so it's more than just a monetary transaction.

"Q. You don't mean to tell us if he shipped a car of sample grade down there, say 75% total damage, and you sell that car of grain, say for nine hundred or a thousand dollars when normally it would bring two thousand or more, you don't mean to tell us that you would give him credit for a full 100,000-pound car of No. 2 yellow milo do you?

"A. Perhaps my statement was misleading. I meant that *as far as his liability to deliver additional grain would be concerned, he would be given full credit.* He's charged *for the difference in value.*

"Q. In other words, as provided in the contract, he's allowed to pay the difference in value; is that right,

between the grain delivered and that called for by the warehouse receipt, is that what you mean?

"A. No, sir.

"Q. Well, what do you mean?

"A. I mean that if he ships a car of grain, *we reduce his liability for the quantity of grain that he still has to deliver* by the weight of that car. Then *he is charged for the difference in the value between the value of the grain that was called for on the warehouse receipts and the net proceeds of the sale;* so it's a bookkeeping transaction or accounting transaction quantity-wise and monetary-wise or money-wise."

It is clear, from the above, that Shannon could ship sample grade grain under his contract, and, even though it were "rejected", he could then require Commodity to sell the so called "rejected" grain on the market and then allow him credit for the weight and volume of grain shipped; the only penalty to Shannon being that he was charged with and had to pay the *difference in value* between such sample grade and the grade called for by the warehouse receipts.

In their dealings with each other under this contract, Mr. Shannon and Commodity Credit Corporation also followed the very clear practice of permitting Shannon to deliver grain or at his option *to pay its cash value.*

The government witness, Pearlie M. Miller, testified (R. p. 140) that on "very small amounts" Shannon had paid cash to Commodity Credit all along for shortages in shipments of grain. He denied knowledge of larger payments and evaded direct replies to questions by saying that such matters would be handled by other departments. This is the old trick of "a wheel within a wheel" by which so many witnesses for the government evaded questions propounded to them in this case.

Willie Mae Rice, who had worked for Shannon as his bookkeeper and had continued to work for the Receiver for

several months, testified that on March 24, 1951 (R. p. 24, third paragraph), Shannon had paid Commodity Credit Corporation, by check (R. pp. 237-238) for 5,890,690 pounds of yellow milo. The check which was given for this grain was for $106,032.52 (R. p. 247). On March 29, 1951, Shannon paid Commodity Credit Corporation for 1,514,950 pounds of yellow milo (R. p. 245, second paragraph). The check given to Commodity for this last named grain was $27,269.01 (R. p. 247).

Mr. Shannon's uncontradicted testimony is that he paid Commodity cash for grain many times during the period of his various contracts with them. We quote Mr. Shannon (R. p. 276) as follows:

> "Q. All right. Now, on that No. 2 grain that you sold out there, where did you get that grain?
> "A. Well, I bought it from the farmers.
> "Q. Well, was there any that you bought from Commodity Credit?
> "A. Yes, sir.
> "Q. How many pounds of grain did you buy from Commodity?
> "A. About eight million pounds.
> "Q. You gave them a check for it?
> "A. Yes, sir.
> "Q. Is that check here among the records?
> "A. Yes, sir."

Later (Record p. 277-278), Shannon further testified as follows:

> "Q. Now, Mr. Shannon, and the other check for $27,000, is it among the records there?
> "A. Yes, sir.
> "Q. Did it come through and was it paid and charged to your account?
> "A. Yes, sir.
> "Q. Commodity Credit got that money?
> "A. Yes, sir.

"Q. Had you ever before bought grain from them back during the years?

"A. Yes, sir.

"Q. They knew you were in the grain business?

"A. Sure.

"Q. Did they ever ask you not to engage in the grain business while you were storing their grain?

"A. No, sir.

"Q. Did you think that under your contract you had a right to be in the grain business?

"A. I sure did.

"Q. And to sell your own grain?

"A. Yes, sir.

"Q. They ever protest to you about selling any of that grain in prior years?

"A. No, sir.

"Q. By the way, Mr. Shannon, from the time you started storing grain for Commodity Credit out there, did they ever during that whole period of time, did they ever send a man out there to check to find out how much grain you had in any of those warehouses or elevators?

"A. They didn't on milo. They did send a man out of the Kansas City office once to check to see how much sudan I had.

"Q. That was away back, was it?

"A. Well, that was since I have been in the storage business.

"Q. How far back was that?

"A. 1945, I believe, or '46; I am not sure.

"Q. Are you testifying that they hadn't checked you since 1945?

"A. They haven't checked me since 1945 for how much I had in storage."

Authorities under Point II

6 Am. Jur. 211, Sec. 49;
6 Am. Jur. 211, Sec. 50;
12 Am. Jur. 795, Sec. 252;
Kansas Flour Mills Company v. *Board of Commis-*

sioners of Harper County, 259 Pac. 795, 54 A.L.R. 1164;
6 Am. Jur. 212, Sec. 52;
Stricklin v. *Rice*, 141 S.W. 2d 748;
Kimbell Milling Co. v. *Greene*, 162 S.W. 2d 991; 170 S.W. 2d 191;
Lotta v. *Transit Grain Co.*, 222 S.W. 2d 467;
Burke v. *Boulder Mill & Elevator Co.*, 235 P. 574;
Smith & Hayslip v. *Wilcox Oil Co.*, 253 S.W. 641;
Geyser Ice Co. v. *Sharp*, 87 S.W. 2d 883;
Zeppa v. *Houston Oil Co.*, 113 S.W. 2d 612;
McMillin v. *Wilson*, 121 S.W. 2d 1029;
District of Columbia v. *Gallaher* (Supreme Court), 124 U.S. 505;
Heidenheimer v. *Cleveland, et al* (Supreme Court), 17 S.W. 524.

Argument under Point II

All American cases which deal with storage contracts wherein it is provided that *the warehouseman may return grain of like quantity and quality or deliver "any other merchantable grain and pay the difference in cash"* hold that a sale results and there is no bailment. Section 13 of the contract in question, quoted above, contains exactly that provision.

> "It is generally held to be a sale, and not a bailment, *if the depositor does not retain* the right to demand *the return of the grain deposited or the delivery of other grain of like grade*, and the warehouseman may return any merchantable grain, *though of other quality*, in such amount as will equal *the value* of the grain deposited, or in the same amount, *with payment for the difference in value*." 6 Am. Jur. 211, Sec. 50, and cited cases.

Not a line in the "Uniform Grain Storage Agreement" even remotely indicates that Commodity "retained the right to demand the return of the grain deposited or the

delivery of other grain of like grade." Quite the reverse is shown by allowances for delivery of "sample grade" or other low grades under the provisions of Sec. 13(c) and Sec. 13(b) which provide for settlements *at market value* for all shortages in either "quantity or quality". There was a shortage of quality, of course, when sample grade was delivered in lieu of No. 2 yellow milo.

This question was decided in *Kansas Flour Mills Company* v. *Board of Commissioners of Harper County*, 259 Pac. 795; 54 A.L.R. 1164. In that case the contract of storage reads as follows:

> "It is expressly agreed and understood that the Kansas Flour Mills Company may deliver any grade of merchantable wheat on the contract, providing that the Kansas Flour Mills Company pays to —— —— the market difference at Kansas City, Mo., *between the grade of wheat covered by this contract* and the *grade delivered* on the date delivery is demanded."

In its interpretation of this contract the Kansas Supreme Court said:

> "In the present action, there was not retained the right to elect to demand the return of the grain deposited or the delivery of other grain of like grade. The contract was to be satisfied by the return of *any merchantable* grain and *payment for difference in value.*
>
> Because the plaintiff had the right to return *any merchantable wheat and pay the difference in value, the possession of the wheat by the plaintiff was not that of a bailee; it was the owner of the wheat*, and the wheat was properly assessed as the property of the plaintiff, who must pay the tax thereon."

Under the *Uniform Grain Storage Agreement*, Government's Exhibit 3, O. L. Shannon could have discharged all of his contracted obligations by following the terms of Sec. 13(b) and 13(c) and settling with Commodity Credit

Corporation by paying cash "for the difference between *the value* of the *quantity* and *quality*" of the grain he loaded out, or delivered, and the quantity and quality of that called for by the warehouse receipts, computed "on the basis of cash prices current in the applicable terminal market". The very fact that his contract allows him to commingle the grain, make substitutions, ship lower grades, and make settlements for shortages in quantity and quality at the market price brings this case within the rules laid down in the above cited authorities.

The very reason for the specific language of this contract is that it is generally recognized that warehousemen engaged in this business are by reason of the nature of the business often unavoidably short on both quantity and quality and can, within reason, only be held liable for *its value*. The very hazardous nature of the business of storing and caring for highly perishable grain, and of commingling it in common warehouses with other stocks, and hazarding loss by deterioration, creates the obvious presumption that the warehouseman should have the right to sell or dispose of grain and buy other grain to protect himself and his depositors against these hazards. It is a severe penalty, in itself, that he should be civilly liable to the extent that he shall be required to settle at market value for stored grains *and make up for losses due to deterioration and shrinkage*. It would be impossible for him to operate and stay in business if he were forced to hold all of the grain at all times, regardless of deterioration.

It is undisputed that 39.8% of all milo shipped during the period was "musty". (Record pp. 414-415.) Wheat shipped in 1951 was 65.6% musty (Record p. 414.) Musty grain carries the grade of "sample" (Record p. 114). Sample grade is the lowest grade of grain (Record p. 113).

It is also undisputed that once grain starts deteriorating in a particular warehouse, the whole of the stored grain

must be "moved" or the spoilage will spread to all of the grain and destroy it (Record p. 111). Grain men of experience know these facts and the courts have recognized them in the above cited authorities. Not only that, the parties to this contract recognized these facts and so interpreted the contract in their dealings with each other as shown by the evidence above quoted as coming from government witnesses. The same authorities cited under the previous argument apply here to the effect that the interpretation placed upon the contract by the parties should govern the construction of that contract.

Mr. Weaver's testimony as quoted in the above statement shows conclusively that Shannon *had the election,* or option, to require Commodity Credit Corporation to sell sample grade grain on the market, when he shipped it to them, and credit him with the weight of grain shipped. In that event he was charged for the difference in value. This is Mr. Weaver, of Commodity Credit Corporation, who gives us this interpretation. We think his interpretation is consistent with the language of the contract. For this reason this contract comes within the rule laid down by the above cited authorities and there was no bailment. Therefore, Mr. Shannon was not guilty of conversion or theft, as a matter of law.

The United States Court of Appeals did not discuss the facts above referred to. The United States Court of Appeals ignored completely the authorities which have been cited here and which were cited in "Appellant's Brief" below. It is fundamental that any defendant, under our system, is entitled to a fair consideration of his case in the light of the true facts and the law.

"A particular transaction is regarded as a bailment if the depositor may require the warehouseman to account for grain deposited upon the basis of the original amount and quality, for this is consistent with the concept of storage,

but it is treated as a mutuum or sale *where the parties contemplate that the warehouseman may account for it on the basis of its value.*" 6 Am. Jur. 211, Sec. 49.

At 6 Am. Jur. 212, Sec. 52, we find the following language:

> "Where grain is delivered to a warehouseman, who mixes it with that of others, under an express contract, or a contract *implied from the usual course of business,* that when the depositor chooses to call for it the warehouseman will have the option to pay the market price or return an equal amount of grain of like quality, the general rule is that the transaction will not be deemed a bailment, but rather, a sale with an option on the part of the purchaser to pay either in money or in property as stipulated."

In connection with the above, footnote 20 on the same page contains a long list of supporting authorities. One of the cases cited is the Texas case of *Stricklin* v. *Rice,* 141 S.W. 2d 748. In the *Stricklin* case, which is apparently the leading case in Texas, Chief Justice Jackson of the Amarillo Court says:

> "However, *the law in Texas seems to be that when there exists no obligation to return the specific article and the bailee is authorized to return another article equally valuable the transaction is a sale and not a bailment. Keystone Pipe & Supply Co. of Texas* v. *Herbert Oil Corporation,* Tex. Civ. App., 62 S.W. 2d 606. The contract, among other things, expressly provides that the appellant may 'get sudan out of storage' when he is ready to sell, provided Manion Rice will not pay him as high a price as other grain dealers, which manifestly means if Rice refuses to pay the market price and Rice reserves the right to purchase the seed if he will pay as much as the other grain dealers, meaning obviously if he will pay the market price.
>
> *This is clearly a contract giving Manion Rice the option either to deliver the quantity and quality of*

seed deposited in the elevator by appellant or pay him the market price therefor."

The court then points out that the law distinguishes between a contract giving the depositor an option to demand the grain or to sell to the warehouseman and anyone he chooses and a contract giving the warehouseman an option. In this connection, the court then quotes from 6 Am. Jur. 212, para. 52, which we have quoted above.

The court then holds:

> "In our opinion, the written agreement gave Manion Rice the option to *return sudan seed of the same class or to pay the highest market price therefor and constituted a sale and not a bailment and therefore Rice was authorized to handle the seed as his own."*

In *Burke* v. *Boulder Milling & Elevator Company,* 77 Colo. 230, 235 P. 574, 575, the Supreme Court of Colorado says:

> "If the option to pay for grain at the market price or return the grain is with the warehouseman, the transaction is a sale. 3 R. C. L. p. 75, para, 6; Savage *v.* Salem Mills Co., 48 Or. 1, 85 P. 69, 10 Ann. Cas. 1065; Cloke *v.* Shafroth, 137 Ill. 393, 27 N. E. 702, 31 Am. St. Rep. 375; Barnes *v.* McCrea, 75 Iowa 267, 39 N. W. 392, 9 Am. St. Rep. 473; Bonnett *v.* Farmers' & Growers' S. Ass'n., 105 Kan. 121, 181 P. 634; Finch *v.* McClellan, 77 Ind. App. 533, 130 N. E. 13, 131 N. E. 236.
>
> "In each of these, and in practically every authority brought to our attention, the contract was for 'market price' or 'current price' or 'highest market price.' Whatever the language, the price is always definite or capable of being made definite. It is such a price, payable at the option of the dealer, which fixes upon the transaction the character of a sale."

The same principles announced in the *Stricklin* case and the Burke case have been followed in all of the Texas cases.

See the Supreme Court case of *Kimbell Milling Co.* v. *Greene,* 162 S. W. 2d 991, affirmed at 170 S. W. 2d 191, in which this same principle is approved, although the case turns on a different set of circumstances. See also *Lotta* v. *Transit Grain Co.,* 222 S. W. 2d 467, holding to the same effect as the *Stricklin case.*

The most favorable view of the contract from the Government's standpoint is that it is an ambiguous one as to the ownership of the grain in storage. The construction placed upon the contract by the parties as shown in the above statement of facts settles the matter for all time as a matter of law. The many small cash payments in lieu of grain together with the two large payments in March 1951, just prior to the dates named in the indictment, show without a chance for a doubt that both Shannon and Commodity interpreted the contract to mean that Shannon might either deliver the grain stored or, at his option, pay the cash value thereof. Not only does it show that he had the right to exercise such option, it shows that *Shannon did on many occasions exercise the option of paying cash instead of delivering grain and that Commodity consistently and over the entire period of the contract accepted cash payments in lieu of grain and recognized his right to exercise that option under the contract.*

The contract in this case was drawn and prescribed by the Government. It is labeled "Commodity Credit Corporation Form 25." (Supplemental Record.) It is the rule that a contract which is of doubtful meaning must be construed against the party who drafted it.

12 Am. Jur., p. 795, Sec. 252:

> "Doubtful language in contract should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it."

This proposition of law is the law of Texas. In fact, it is so general and universal that it scarcely requires detailed citation of authorities.

The contract as written must also be construed in the light of the interpretation placed upon it by the parties themselves as we have stated above. This is particularly true where the contract is of doubtful meaning. The best aid in finding the intention of the parties *is to look to the construction the parties themselves have placed on their contract by their actions.* This rule has been laid down in many cases. *Smith & Hayslip* v. *Wilcox Oil Co., et al.*, (Tex. Civ. App. 1923) 253 S. W. 641; *Geyser Ice Co.* v. *Sharp* (Tex. Civ. App. 1935), 87 S. W. 2d 883; *Zeppa* v. *Houston Oil Co. of Texas* (Tex. Civ. App 1938), 113 S. W. 2d 612; *McMillin* v. *Wilson* (Tex. Civ. App. 1938), 121 S. W. 2d 1029. The Texas Court of Civil Appeals has said, in language which certainly does apply here:

> "The construction placed upon a contract by the parties themselves is entitled to great weight, if not of controlling influence, in ascertaining their understanding of its terms. It is said in 6 Ruling Case Law, P. 853, Sec. 241:
>
> " 'It is to be assumed that parties to a contract know best what was meant by its terms, and are the less liable to be mistaken as to its intention; that each party is alert to protect his own interest and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it to be.' " *Livingston Oil Corp.* v. *Waggoner* (Tex. Civ. App. 1925), 273 S. W. 903.

It is not necessary that the contract be "ambiguous" for the above rule to apply, where both parties adopt and accept a day by day interpretation of the contract with their eyes open and with full mutual consent and understanding

of what they are doing. Surely Shannon knew what he was doing when he wrote the checks in March 1951 for $27,269.01 and $106,032.52 and *Commodity knew what it was doing when it endorsed and cashed those checks.*

The testimony shows that on March 24, 1951, prior to the dates alleged in the indictment, Mr. Shannon gave Commodity Credit Corporation a check for $106,032.52 (R. 247). Later in the month on March 29 he gave Commodity Credit Corporation a check for $27,269.01 (R. 247). The record is not clear whether this was for grain which Shannon had previously sold or whether it was grain that he actually purchased from Commodity Credit stocks on the dates named in the checks. However, the United States attorney in his argument contended that these checks were given by Shannon in lieu of grain which had been stored with Shannon by Commodity Credit Corporation and for which Shannon was "short," his words (R. 552), being as follows:

> "Oh, they make a big to do about his purchasing grain from the Commodity Credit Corporation. What was he doing, gentlemen? *Just trying to make up some of his shortage that he had full knowledge of* it and had known about for a long, long time. That's all."

Under the United States attorney's theory, then, we have at least two instances where Shannon was permitted to exercise, in a large way, his option to pay the cash value of the grain instead of delivering it. In addition to this, Mr. Weaver, a government expert, testified that on many occasions Commodity accepted smaller amounts for differences in value when Mr. Shannon would elect to ship sample grade or other low grade grain in lieu of Number 2 Yellow Milo or good wheat (R. 441). All of which shows without doubt that the parties lived under and themselves interpreted the contract as being of the same type

and character described in the *Burke* and *Stricklin* cases, *supra.*

In this connection, however, should the court determine that the two large checks given by Shannon in March 1951 were for grain actually purchased by Shannon then, and on that date, that is that the checks were for grain then actually physically in storage; the acceptance of such checks for that purpose by the Commodity Credit Corporation *would none the less be a recognition of the right of Shannon under his contract to elect to pay cash for the grain,* or any part thereof, stored with him instead of redelivering it, and would constitute an interpretation of the contract by both parties to it as being a contract which gave such option to the warehouseman.

In the case of *District of Columbia* v. *Gallaher,* 124 U. S. 505, the Supreme Court of the United States passed on a situation involving a contract between the plaintiff in that case and the District of Columbia for the construction of a sewer system. There had been several radical departures from the requirements and specifications of the contract in the construction of the sewer line and the government of the District of Columbia for that reason had refused to pay a portion of the contract price. It seems that the work was actually performed under the supervision and with the consent of the District of Columbia engineer, both the engineer and the contractor being under the impression that they were following the contract. In passing on this situation, the Supreme Court of the United States held as follows:

> "The work as actually done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that *the practical construction which the parties*

> *put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract.''*

The Supreme Court of Texas has followed the Supreme Court of the United States in this rule. In the case of *Heidenheimer* v. *Cleveland et al.*, 17 S. W. 524 (Supreme Court 1891), the Texas Supreme Court holds as follows:

> ''But, upon the other hand, it is equally well settled that where the terms of the contract are uncertain, and its true intent and meaning doubtful, then the practical construction which the parties themselves put upon the contract by their conduct thereunder is of vast importance in ascertaining its true meaning, and 'may prevail over the literal meaning of the contract.' Authorities supra, and District of Columbia *v.* Gallaher, 124 U. S. 505; 8 Sup. Ct. Rep. 585.''

Citing other authorities in addition.

If we apply the same test in the case at bar, Shannon had the right to deliver either the stored grain or pay its cash value as he might elect, and as he had elected to do on many occasions *with the full approval and cooperation of Commodity Credit Corporation.*

Among others, this is one of the distinguishing differences between this case and the case of Herman Dawson v. U. S., 203 F. (2) 201, cited by the United States Court of Appeals in this case. In the Dawson case we find no such condition discussed either in Appellant's Brief nor in the Court's opinion. We assume that the question was not presented nor considered in the Dawson case. Unlike the Dawson case, this case clearly presents a situation *where both parties to the contract had interpreted such contract as giving Shannon the option to either re-deliver grain or to pay its cash value.*

That being true, Shannon was the owner of the grain described in the indictment under the authorities first above cited. Then, Shannon is not guilty, as a matter of law, as to any count of the indictment in this case.

There is no authority anywhere to support the decision of the Court of Appeals in this case, *if the true state of the record* in this case is recognized. The Court of Appeals could not have affirmed this case by any sort of maneuver had it quoted the above facts and excerpts from decisions in its opinion. Not the mere weight of authority, but all authorities are against the decision of the Court of Appeals in this case.

Point III

Vindictive, prejudiced, false, and improper statements made by the United States Attorney and his assistants in their arguments to the jury, which statements were not supported by the record and were highly inflammatory and prejudicial to Petitioner and influenced the jury to return its verdict of guilty, require reversal of the case in the usual and accepted course of judicial procedure.

Statement of Facts

During Argument of Counsel, Mr. Settle for the government speaking, the following transpired (Record p. 516):

> "The question before you, good or bad as to the parity law, did he steal the grain bought by his government, paid for by you? Were the taxpayers financing this construction? Were they financing his movie producing out there?
>
> "Mr. Cade:
>
> "We except to that remark, too, Your Honor, as being highly inflammatory, the remark he made by asking, is it paid by the taxpayer or is it paid for by you, gentlemen of the jury, as being highly inflammatory.

"The Court:

"I think you better cast your argument differently.

"Mr. Settle:

"All right."

It will be noted that the Court did not instruct the jury not to consider the statement so made by Mr. Settle. In fact, the Court infers that if the argument were cast differently it might be such as should be considered by the jury.

Again while Mr. Settle was speaking to the jury the following transpired (Record p. 521):

> "They have a bunch of character witnesses. Now, gentlemen, on character witnesses, some of them said he done a lot of business with them, but I submit, gentlemen, there is not hardly any gentleman that can't get some character witnesses.
>
> "Judas Iscariot had a very good reputation before he sold his Lord. Alger Hiss had some awful good character witnesses, some of the best.
>
> "Mr. Cade.
>
> "Now, if the Court please, we take a bill of exception to the remarks just made by counsel about Judas and Alger Hiss as being highly inflammatory and prejudicial.
>
> "The Court:
>
> "I will sustain the objection."

Again the Court fails to instruct the jury not to consider the improper Argument. We took a "bill of exception" to the remarks of Mr. Settle, which was not an objection at all—but a bill of exception. The Court might have cured our exception by specifically instructing the jury as to the impropriety of the argument, but he failed to do so.

Again, when Mr. Potter was speaking to the jury for the Government, the following transpired (Record pp. 550-551):

> "Now, the only question in this case is whether or not this defendant has done that. Oh, they harp a lot about criminal intent. Mr. Bowlin made the startling statement in his argument here that the government had to show a criminal intent on the part of Shannon at the time he stole this grain. Well, that's a little bit of an inconsistency, that statement, 'at the time he stole the grain'."

A careful reading of Mr. Bowlin's speech (Record p. 524 to p. 530) discloses that he made no such statement, nor anything resembling such a statement. The statement made by the United States attorney was deliberately misleading, false, prejudicial, biased and vindictive. Its effect on the jury could have been only an injurious one to this Appellant. Such a remark could not but appeal to bias, passion and prejudice. The Court of Appeals, in this case, stated that such statements "overstepped the bounds".

Authorities under Point III

Braswell v. United States, 200 F. 2d 597.

Argument under Point III

It is clear from the foregoing quotations and references to the Record that Petitioner was deprived of the right to a fair, unbiased and unprejudiced jury trial. The jury was inflamed by the unsupported, biased, impassioned and vindictive remarks made to them throughout the trial and particularly in the arguments by the prosecuting attorneys. The trial court did nothing to alleviate the effect of such remarks and in some of the instances above referred to, the Court only aggravated the evil by the comments he did make to the jury.

We think the law with reference to this sort of a situation was quite adequately stated in the case of Braswell v. United States, 200 F. 2d 597 in the following language:

> "The right to trial by jury comprehends a fair determination of the guilt or innocense of the accused, free from bias, passion or prejudice. See United States v. Haupt, 7 Cir., 136 F. 2d 661. And where error occurs which, within the range of a reasonable possiblity, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. See Little v. United States, 10 Cir., 73 F. 2d 861, 866, 96 A.L.R. 889; Cf. Kotteakos v. United States, 328 U. S. 750, 763-765, 66 St. Ct. 1239, 90 L. Ed. 1557.
>
> "As to the appellant Hoffman, the Government argues that under the decision in Christensen v. United States, 9 Cir., 16 F. 2d 29, he has no right to complain, since he initiated the violent acts by striking the United States Marshal after the Government had presented its case and rested. Ample power rested with the court to punish Hoffman for contempt, which was done. Denial of a fair trial is beyond the range of such punishment. It did not appear that Hoffman's violence was deliberately staged for the purpose of inducing a mistrial, nor did it appear that he was connected with the subsequent misconduct of other co-defendants. Even under the most trying circumstances, every needed power of the court must be exerted to guarantee and make effective a right of such transcendent importance as the right to a fair trial.
>
> "Further, *the comments of the court, while made with the best of intentions to prevent further prejudice of the defendants in the minds of the jury, actually expressed the court's belief that Hoffman and other unnamed defendants were under the influence of marihuana.* In a case where they were charged with unlawfully acquiring and obtaining marihuana, such comments were bound to be highly prejudicial. Jurors properly bear great respect for the Judge conducting

the trial, and his every word and act are calculated to have a strong influence upon them. Quercia v. United States, 289 U. S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321. See United States v. Levi, 7 Cir., 177 F. 2d 833. In entire fairness, the judge later certified, 'that there was no evidence that the defendant James Wade Braswell or Bobby Gene Grubbs, were under the influence of any drug whatsoever and the defendant, Bobby Lee Hoffman, was at all times during the trial and for several weeks prior thereto, in the custody of the United States Marshal.'

"While *counsel for the defendants did not specifically object to the comments of the court on the trial,* we think that they affected substantial rights of the defendants and that *it is the responsibility of this court to notice them.* Rule 52 (b), Federal Rules of Criminal Procedure; United States v. Ward, 3 Cir., 168 F. 2d 226, 228; Robertson v. United States, 84 U. S. App. D. C. 185, 171 F. 2d 345, 346. We think that none of these appellants have had that fair and impartial trial which is their constitutional right, and the judgment is therefore reversed."

For the reasons stated in the above case, the argument of government counsel alone should be sufficient reason to reverse this cause.

The United States Court of Appeals in its opinion holds that the remarks made by government counsel were improper. It then holds that these improper arguments were immaterial, all of which is a departure from normal judicial procedure. Such departure is so pronounced and definite in this and the other points above discussed as to constitute a complete denial to Petitioner of his right to a fair and impartial trial on the law and the facts of his case.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

E. T. Miller,
James O. Cade,
Counsel for Petitioner.

Kenneth Bowlin,
Of Counsel.

APPENDIX "A"

Excerpt from Vol. 16, Vernon's Annotated Revised Civil Statutes of Texas:

"Art. 5645. *Perishable or Dangerous Goods*

"If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644. Id. sec. 34."

Historical Note

This article is identical with the provisions of section 34 of the Uniform Warehouse Receipts Act, see 3 Uniform Laws Annotated, except for the substitutions of "article" for "section", and "Article 5644" for "preceding section".

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON, *Petitioner*

vs.

UNITED STATES OF AMERICA

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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UNITED STATES OF AMERICA

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner O. L. Shannon asks leave of the Court to file and present the following as a supplemental to his "Brief in Support of Petition for Writ of Certiorari":

ADDITIONAL SPECIFICATION OF ERROR NO. VI:

The United States Court of Appeals erred in sustaining the trial court's action in overruling O. L. Shannon's Motion for Judgment of Acquittal, because the Government failed to prove any actual physical shortage of grain on any date mentioned in any count of the indictment. (R. p. 174-175 and 507-508)

POINT IV.

A conviction based solely on a false mathematical conclusion by an expert government witness constitutes a denial of "due process" under the Fifth Amendment to the Constitution.

SUMMARY STATEMENT AND ARGUMENT

During the period under survey in this case there had never been an actual physical inventory, at any time, of grains in storage at the O. L. Shannon warehouses. (R. pp. 94-95). The Government witness Charles C. Weaver, Jr., admitted (R. pp. 99-101) that, from the computations made, he couldn't tell "how much grain Mr. Shannon had on hand on any of these dates."

However, those very "computations" as made by the Government witness, John J. Bachmann, were the sole proof made by the Government to show shortages in grain on each of the dates mentioned in the indictment. (R. pp. 153-171.) The method used by Mr. Bachmann to reach the mathematical conclusions given by him in his testimony is described by him as follows. (R. p. 148).

> "Your Honor, *we took all of the records of grain coming in, into the house, and we took all of the records of the grain going out of the house.* WE put those in chronological order, day by day, and inserted them on a working sheet. We did the same thing insofar as the warehouse receipts were concerned and the stores, the open storage ledger, which is grain stored in the house not on warehouse receipts. We also put that in chronological order day by day. And after we had that day by day we made our calculations from a zero inventory—*at the time we were there there was no inventory, no grain on hand. With that we worked back day by day to show what inventory was to be or should be on hand according to the documents,* according to the records, and what the outstanding

obligations were for grain day by day, according to the records."

To illustrate the fallacy of such a mathematical manipulation, let us take an hypothetical case as illustrated by Appendix "X". In this hypothetical case we shall assume that a warehouseman started in business on May 1 with empty warehouses. He takes in 10,000 pounds of grain during the month and ships out 1,000 pounds. He loses 200 pounds by shrinkage (R. pp. 108-109, 122, 260) and has an actual physical inventory of 8,800 pounds at the end of the month. He continues in business and keeps perfect records on inventories, storage, shipments and outstanding warehouse receipts and finally goes out of business in October, leaving his warehouse empty. Appendix "X" above referred to, reflects his exact condition each month of his operations. A day by day record, if it were so broken down, would show his exact daily condition. This is true because the figures are taken from *exact records* based on *actual physical inventories.*

Now, the only figures Mr. Bachmann had available were those in Columns 3, 4, 8, and 9 of Appendix "X". From those figures worked "in reverse" and attempted to "reconstruct" the daily inventories, by "adding and subtracting" (R. p. 149.)

Following Mr. Bachmann's method, we have "reconstructed" the given hypothetical case, as shown in Appendix "Y". We do that by taking the last figure (7,875) in column 4 of Appendix "X" and placing it in Column 4 of Appendix "Y" as the first of the month inventory for October and in Column 5 of Appendix

"Y" as the end of September inventory. To this figure of 7,875 we add the 10,000 pounds of grain shipped out during September and then subtract the 2,000 pounds stored during that month (See R. p. 149.) This leaves an inventory of 15,875 pounds for September 1, *when, in fact, as shown by Col. 2 of Appendix "X", there was actually 16,267 pounds in storage on September 1.*

Of course, in the hypothetical case stated, we are using only a few thousand pounds of grain. It can readily be seen what a tremendous difference there would be where the amount dealt with, as in Shannon's case, ran into millions of pounds.

If we continue to follow Mr. Bachmann's mathematical process on through the hypothetical situation, a number of startling results occur. Not a single "reconstructed" inventory as shown in Appendix "Y" is anywhere near accurate as shown by Appendix "X". In each instance the "reconstructed" inventories of Appendix "Y" *show a much greater shortage than the actual inventories* reflected in Appendix "X". And, finally, under Appendix "Y" we come out in April, *the month before we started in business,* 2,125 pounds "short!"

Not only did we object (R. pp. 145-152) to this evidence as it came in, but we based our Motion for Judgment of Acquittal largely upon it. (R. pp. 174-175, 507-508). There is nowhere in the record any evidence, other than Bachmann's testimony, of shortage of grain during May, June and July, 1951. The periods covered in the indictment. The only inventory ever taken was in August 1951, which was subsequent to the dates

named in the indictment as well as being subsequent to the devastating flood of June 4, 1951 (R. pp. 273, 279) in which many millions of pounds were totally destroyed, (R. p. 286) above the usual and normal shrinkage.

There is no way in which there could have been a reliable or true "reconstruction" of Shannon's inventories from day to day, or from month to month, by the method followed in this case. We have found no accountant anywhere who can agree with Mr. Bachmann's figures or his method. He starts on a false premise and ends with a false answer. We believe that a prosecution founded upon such erroneously false mathematical conclusions deprives Mr. Shannon of that right to a fair trial guaranteed by the Constitution, and therefore denies to him his rights under the Fifth Amendment. It was never contemplated by the framers of our Constitution that a Government employee could, by juggling figures, and by giving purported expert mathematical testimony, based on such false figures, bring about the conviction of a citizen. We do not question Mr. Bachmann's ability as an accountant but we fail to comprehend the state of mind which prompted him to give such testimony as he did give, *when he must have known its fallacy from the accounting standpoint.* A man of his high intelligence must have known that his testimony as to shortages in grain on the particular dates, based on this false mathematical conclusion, was the testimony on which Shannon would be convicted, if at all.

The general law on such a situation is stated in

20 *American Jurisprudence* p. 1035, Sec. 1184, as follows:

> "Testimony of a witness, although not directly controverted, which is opposed to the unquestioned laws of nature that lie within the court's judicial knowledge or which is clearly in conflict with scientific principles as established by the laws of physics or mechanics is of no probative value. The court may refuse to permit such testimony to be received in evidence or considered by the by the jury; and, if it is admitted, the jury may disregard it, or the court may direct a verdict or sustain a demurrer to the evidence. The jury may not rest its verdict on testimony at variance with well-established and universally recognized physical, mechanical, and mathematical laws. A verdict that is based upon such testimony cannot be said to be based on any evidence and the trial court may set it aside and grant a new trial or upon review the appellate court may ignore the testimony or reverse the case for lack of evidence sufficient to sustain the same."

See also 3 *American Jurisprudence*, page 451, Section 891, holding to the same effect and citing numerous authorities in support.

CONCLUSION

It is, therefore, respectfully submitted, as in our main brief, that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

E. T. MILLER
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By: _____
Counsel for Petitioner

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APPENDIX "X"

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 7	Col. 8	Col. 9
	First of Month Physical Inventory in Pounds	Grain Stored in Pounds	Grain Shipped out in Pounds	2% Monthly Shrinkage in Pounds	End of Month Physical Inventory in Pounds	Accumulated Shrinkage 2% Monthly in Pounds	Outstanding warehouse receipts End of month in pounds	End of Month Book Inventory in Pounds
April	0	0	0	0	0	0	0	0
May	0	10,000	1,000	200	8,800	200	9,000	9,000
June	8,800	20,000	2,000	576	26,224	776	27,000	27,000
July	26,224	1,000	17,000	548	9,676	1,324	11,000	11,000
Aug.	9,676	10,000	3,000	409	16,267	1,733	18,000	18,000
Sept.	16,267	2,000	10,000	392	7,875	2,125	10,000	10,000
Oct.	7,875	0	7,875	0	0	2,125	2,125	2,125
Nov.	-2,125	0	0	0	0	2,125	2,125	2,125
TOTALS	-2,125	43,000	40,875			2,125	2,125	2,125

NOTE: In this hypothetical situation, all figures are taken from actual books and records of the warehouseman.

APPENDIX "Y"

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6
	Grain Stored Pounds	Grain Shipped Out, Pounds	First of Month "Reconstructed" Inventory Pounds	End of Month "Reconstructed" Inventory Pounds	Outstanding warehouse receipts end of month in pounds
Nov.	0	0	0	0	2,125
Oct.		7,875	7,875	0	2,125
Sept.	2,000	10,000	15,875	7,875	10,000
Aug.	10,000	3,000	8,875	15,875	18,000
July	1,000	17,000	24,875	8,875	11,000
June	20,000	2,000	6,875	24,875	27,000
May	10,000	1,000	-2,125	6,875	9,000
April	0	0	-2,125	-2,125	2,125
March	0	0	0	-2,125	2,125

NOTE: This is the "reversed method" employed by Mr. Bachmann to "reconstruct" the inventories shown in Columns 4 and 5 above. **The only actual figures** he had were those in Columns 2, 3 and 6, above.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 613

O. L. SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (S. R. 21-27) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1954 (S. R. 27), and a petition for a rehearing was denied on February 3, 1954 (S. R. 28-36). The petition for a writ of certiorari was filed on March 2, 1954. The jurisdiction of this

[1] "S.R." refers to Volume II, the supplemental transcript of record. "R." will refer to Volume I of the record.

Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence proved petitioner's criminal intent to steal and convert grain of the Commodity Credit Corporation stored in his warehouse.

2. Whether the storage agreement made petitioner a bailee, rather than the owner, of the grain stored by the Commodity Credit Corporation, so that petitioner could be convicted for the theft and conversion of Commodity's grain.

3. Whether certain remarks in the prosecutor's closing argument required reversal of the conviction.

STATUTES INVOLVED

Section 15(c) of the Commodity Credit Corporation Charter Act, Public Law 806, 80th Cong., 62 Stat. 1070, 15 U. S. C. (1946 ed., Supp. V), 714m(c) provides:

> Whoever shall wilfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

Volume 16, Vernon's Civil Statutes of Texas, Article 5645, provides:

> If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or

by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644.

Volume 16, Vernon's Civil Statutes of Texas, Article 5644, subsection 4, provides:

> * * * From the proceeds of such sale, the warehouseman shall satisfy his lien * * *. The balance, if any, of such proceeds shall be deposited with the county clerk of the county in which the warehouse is located and shall be delivered, on demand, to the person to whom the warehouseman would have been bound to deliver, or justified in delivering the goods, for which the receipt was issued. * * *

STATEMENT

Petitioner was charged in an indictment of 47 counts in the United States District Court for the

Northern District of Texas with violations of Secsion 15(c) of the Commodity Credit Corporation Charter Act (*supra*, p. 2), in that on certain days in May, June and July 1951 he did knowingly and wilfully steal and convert to his own use large amounts of grain sorghum and wheat,[2] which were the property of the Commodity Credit Corporation, an agency of the United States within the Department of Agriculture (R. 1-22). Six counts were dismissed by the Government at the start of the trial (R. 53-54), and the jury found petitioner guilty on the remaining counts (R. 574). He was given concurrent sentences of five years on each of 38 counts. On three other counts he was given sentences of two years to run concurrently with each other, and he was fined $5,000 on each such count. The execution of the two-year sentences was suspended and he was placed on probation as to these sentences under certain conditions, the probation to begin after completion of the concurrent five-year sentences. (R. 578.) On appeal (R. 38-40), the conviction was unanimously affirmed (S. R. 27).

The evidence may be summarized as follows:

Petitioner was a warehouseman who operated under the name of Shannon Elevator in Sudan, Texas; well over 90% of the grain warehoused in his facilities was stored for the Commodity Credit Corporation (hereafter called Commodity). He entered into Uniform Grain Storage Agreements with Commodity (Gov. Ex. 1, 2, 3), dated June 1,

[2] Only counts 46 and 47 dealt with wheat (R. 22).

1949, July 1, 1949 and June 1, 1950 respectively. (S. R. 3-19, R. 57-58.) The last of these contracts (S. R. 11-19) provided in paragraph 6 for the commingling of the grain stored in the warehouse; in paragraph 7(a) it provided that "With respect to the grain stored commingled, the warehouseman shall at all times maintain in the warehouse indicated on the warehouse receipts and in which the grain was originally deposited for storage a stock of grain of the quantity, class, grade, and quality which he is obligated to deliver under the warehouse receipts;" and in paragraph 11(a) it provided further that the warehouseman "shall upon surrender of warehouse receipts representing the grain stored in such elevator(s) or warehouse(s), when so requested by Commodity, deliver the grain."

Witness Weaver, a Department of Agriculture accountant, testified as to the total quantities of undelivered grain sorghum or wheat represented by warehouse receipts issued by petitioner and acquired by Commodity through matured loans, direct purchases or otherwise, as of the particular date in each count of the indictment (R. 87-91). He also testified that the total quantities of grain sorghum and wheat, represented by warehouse receipts issued by petitioner and acquired by Commodity, upon which delivery had not been made, were 30,631,405 pounds and 37,676.95 bushels, respectively (R. 96).

The Government proved with respect to each of the undismissed counts specific shipments of grain

by petitioner from Sudan, Texas, to N. K. Parrish, Uhlmann Elevators Company, Transit Grain Company, and Rock Island Grain Company (R. 103-128). Commodity did not at any time issue the required order to load out any of these shipments to the parties named (R. 133-137).

John Bachmann, a Department of Agriculture accountant who examined petitioner's books and records, testified that after October 15, 1949, petitioner was never in a "long" position, since from that date on his grain inventories were less than his obligations to deliver (R. 144-145, 152-153). Bachmann also testified, as of the date of each of the undismissed counts, regarding petitioner's shortages. Showing what percentage of grain sorghum or wheat stored in petitioner's warehouse belonged to Commodity on each date (in all instances over 95%), and applying these percentages to the shipments proved to N. K. Parrish, Uhlmann Elevators Company, Transit Grain Company, and Rock Island Grain Company, he stated the amount of grain in each such shipment which was owned by Commodity. (R. 153-170.)

In an invoice covering the period from January 1, 1951, through June 30, 1951 (Gov. Ex. 32), petitioner made a claim against Commodity for $41,111.17 in storage charges (R. 389-394, 435). On August 18, 1951, J. W. Mize, a Department of Agriculture auditor, went to petitioner's warehouse to measure the quantity of his grain to see if there was enough on hand to cover his outstanding storage commitments. Mize testified that on August 20 petitioner told him that "he was short of grain

and that he wondered if it wouldn't be possible for me to forget about measuring his inventory at that time," but Mize replied that he could not, and proceeded to ascertain petitioner's grain shortage. (R. 444-450.) About August 22 Commodity ordered petitioner not to load out any more grain except to it (R. 346-347). Meanwhile, however, on Sunday night, August 19, petitioner had succeeded in delivering a large shipment of grain to a Sudan feed company (R. 347, 473, 478). Petitioner's business went into receivership on November 24, 1951 (R. 69).

Petitioner testified that in the spring of 1951 he knew of his grain shortage, and that he could not fill the Commodity orders after he ran out of grain (R. 336). He at first denied, but lated confirmed, that he had signed a written statement dated August 27, 1951, admitting that he had sold Commodity grain to a designated list of persons and concerns (R. 336-338, 386, 399-400).

ARGUMENT

1. There is no merit in petitioner's contention that under Article 5645 of Vernon's Civil Statutes of Texas (*supra*, pp. 2-3) he could take steps to sell grain to prevent damage or spoilage, and that, therefore, he could not have intended to steal or convert the grain stored with him by Commodity (Pet. 14-20).[3] There was no showing that petitioner complied with Article 5645 or had any idea

[3] It should be remembered that petitioner was not convicted of stealing or converting any of the relatively small amounts of grain damaged or spoiled while in storage at his warehouse. See R. 576.

that he was doing so. That article requires the warehouseman to give reasonable notice to the owner of the property to satisfy the lien upon the stored perishable or dangerous goods and to remove them from the warehouse. It provides that if the owner does not do so, the warehouseman may sell the goods at public or private sale and apply the proceeds in accordance with Article 5644 (*supra*, p. 3), which provides in subsection 4 that out of the proceeds the warehouseman shall satisfy his lien and expenses and deposit the balance with the county clerk for delivery to the person to whom the warehouseman would have been bound to deliver the goods. Here, however, petitioner did not give notice to Commodity to satisfy his lien upon the grain and to remove it from the warehouse, nor was an attempt made to turn over a cash balance to Commodity after the satisfaction of any warehouseman's lien. [4]

The court's instruction clearly required criminal intent on the part of petitioner before he could be convicted (R. 567). See *Morissette* v. *United States*, 342 U. S. 246. Such intent was inferable from his continuous large-scale sales of Commodity's grain at a time when he was cognizant of a serious shortage in his inventory. As the

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[4] The letter petitioner claims he wrote to Commodity notifying it of damage to the stored grain by a flood in June 1951 (R. 349, 182) was not compliance with Article 5645, and did not mention enforcement of a warehouseman's lien. Petitioner, moreover, did not have a copy of this alleged letter, and the jury, in determining his credibility, may well have disbelieved that there was such a letter.

trial court aptly stated before pronouncing sentence (R. 577-578):

"[Petitioner] had denied criminal intent, and yet at the very time the inspector for Commodity Credit Corporation was out there on the grounds in August of 1951, he was hurriedly, and as I would confidently suppose, at night moving large quantities of grain, and abnormal quantities of grain, out of those facilities. No wonder the jury took no stock in the disclaimer of any criminal intent."

2. Petitioner contends that under the Uniform Grain Storage Agreement of June 1, 1950 (S. R. 11-19) he was the owner, not the bailee, of Commodity's stored grain, with the consequence that he could not be convicted for wilful conversion or theft (Pet. 20-39). He invokes in this connection cases involving contracts under which a warehouseman has a clear option either to return the goods stored, or to deliver other merchantable goods together with a payment of any difference in value.[5] But the argument is without substance, and the cases petitioner cites are irrelevant, since the contract involved here gave him no such option.

A reading of the contract makes it clear that petitioner did not become the owner of Commodity's stored grain, but merely a warehouseman bailee for hire. The title of the agreement shows that it is for "storage." Paragraph 3 recites that Commodity desires that the storage facilities, which

[5] *E.G., Stricklin* v. *Rice*, 141 S. W. 2d 748 (Tex. Civ. App.); *Kansas Flour Mills* v. *Board of Commissioners*, 124 Kan. 312, 259 Pac. 795.

the warehouseman represents he has in paragraph 2, be made available with respect to grain "owned by" Commodity. Paragraph 5 provides that the grain stored by the warehouseman shall be "loaded out and shipped as requested by the *owner* [plainly Commodity and not petitioner, who is described in the same paragraph as "the warehouseman"] * * * in accordance with the provisions of this agreement." (Emphasis added.) Paragraph 7 (a) provides that "With respect to the grain stored commingled, the warehouseman shall at all times maintain in the warehouse indicated on the warehouse receipts and in which the grain was originally deposited for storage a stock of grain of the quantity, class, grade and quality which he is obliged to deliver under the warehouse receipts." Paragraph 11(a) provides that the warehouseman "shall upon surrender of warehouse receipts representing the grain stored in such elevator(s) or warehouse(s), when so requested by Commodity, deliver the grain." Paragraphs 17 and 18 provide for a schedule of applicable rates and the payment of charges by Commodity to the warehouseman, showing further that the latter was not the owner of the stored goods under the contract.[6]

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[6] Paragraphs 11 and 13 of the contract, upon which petitioner relies, do not give rise to an option on his part. Under paragraph 11 the warehouseman's primary duty is to "load out" the stored grain upon Commodity's request, and only after the loading and inspection does the question arise as to a settlement between the warehouseman and Commodity regarding quality deficiencies. Paragraph 11(b)(ii) refers to paragraph 13, which shows that whatever option is provided for is given to Commodity. Section 13(a)(ii) provides that "Commodity shall have the election to reject grain not meeting

Dawson v. *United States,* 203 F. 2d 201 (C. A. 5), upon which the court below relied, is directly in point; it involved the same type of conviction and a contract apparently identical to the one in the instant case. In *Dawson* the court, interpreting the contract, held (203 F. 2d at 203) that the convicted defendant clearly "was not making an agreement for the storage of grain to be purchased by him, and that he only held the grain in trust as bailee for the holders of the warehouse receipts."[7]

3. Finally, petitioner complains that certain allegedly prejudicial remarks by the prosecutor in his closing argument constitute reversible error (Pet. 39-43). In the first incident the prosecutor called upon the jury to decide whether petitioner stole

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the applicable requirements of section 11, but the warehouseman shall pay Commodity the value of the grain which should have been delivered rather than replacing such rejected grain." Consequently, before the warehouseman is to pay Commodity any money, Commodity must exercise its election to accept or reject the tendered grain. In the event of rejection, the obligation (not the privilege or right) of the warehouseman arises to pay the value.

It should be noted that the two purchases of grain by petitioner, from Commodity on March 24 and 29, 1951, for which he paid $106,032.52 and $27,269.01, respectively (R. 244, 245, 247), were not settlements for deficiencies in quality or quantity of grain in deliveries pursuant to loading orders under paragraphs 11 and 13. These were transactions in which Commodity made direct sales to petitioner of grain in "flat storage" (R. 270).

[7] The anomaly of petitioner's asserting ownership of the grain stored by Commodity, and at the same time claiming $41,111.17 in storage charges from Commodity (R. 389-394, 435), is at once apparent. That petitioner was aware that he was not the owner of the stored goods is shown by his testimony (R. 332): "Q. Isn't it your understanding of the contract that all they required for you to do was to give them back what they stored with you and paid storage charges on? A. That's right."

the grain "bought by his government, paid for by you." Petitioner objected to the remark as inflammatory, the court in effect sustained the objection by directing the prosecutor to cast his argument differently, and the prosecutor acquiesced. (R. 516.) In the second instance the prosecutor, in referring to the facility with which character witnesses may be obtained, stated: "Judas Iscariot had a very good reputation before he sold his Lord. Alger Hiss had some awful good character witnesses, some of the best." Petitioner's objection to this statement was sustained and his counsel was apparently satisfied with the ruling. (R. 521.) In the last incident, the prosecutor inadvertently referred to the fact that Mr. Bowlin, one of petitioner's attorneys, had stated in his argument that the Government must show a criminal intent at the time petitioner "stole" the grain, whereas Bowlin had actually used the word "sold" (R. 550-551, 527).[8] This remark apparently seemed so trivial at the time, however, that no objection was made, and the point was raised for the first time on appeal.

Petitioner now argues that the judge should have gone beyond sustaining the objections which were made and should have instructed the jury to disregard the remarks, including the one not objected

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[8] Cf. *Jarvis* v. *United States*, 90 F. 2d 243, 246 (C. A. 1), certiorari denied, 302 U. S. 705: "In long and complicated trials it is not uncommon for counsel arguing to the jury to make unintentional misstatements of fact. When this occurs it is the duty of opposing counsel to call attention to the misstatement and request the court to instruct the jury to disregard it."

to. But since counsel seemed content with the ruling at the time, the argument comes too late on appeal. Rule 30, F. R. Crim. P.; cf. *Crumpton* v. *United States,* 138 U. S. 361, 364; *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 238-239. In any event, as the court below held (R. 26-27), petitioner's guilt was so overwhelmingly shown by the evidence that these minor incidents are clearly not substantial error. *Kotteakos* v. *United States,* 328 U. S. 750, 764; *Lutwak* v. *United States,* 344 U. S. 604, 619-620; Rule 52 (a), F. R. Crim. P.

CONCLUSION

The case was correctly decided in accordance with established legal principles, and there is no question warranting further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

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No. 613

O. L. SHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI

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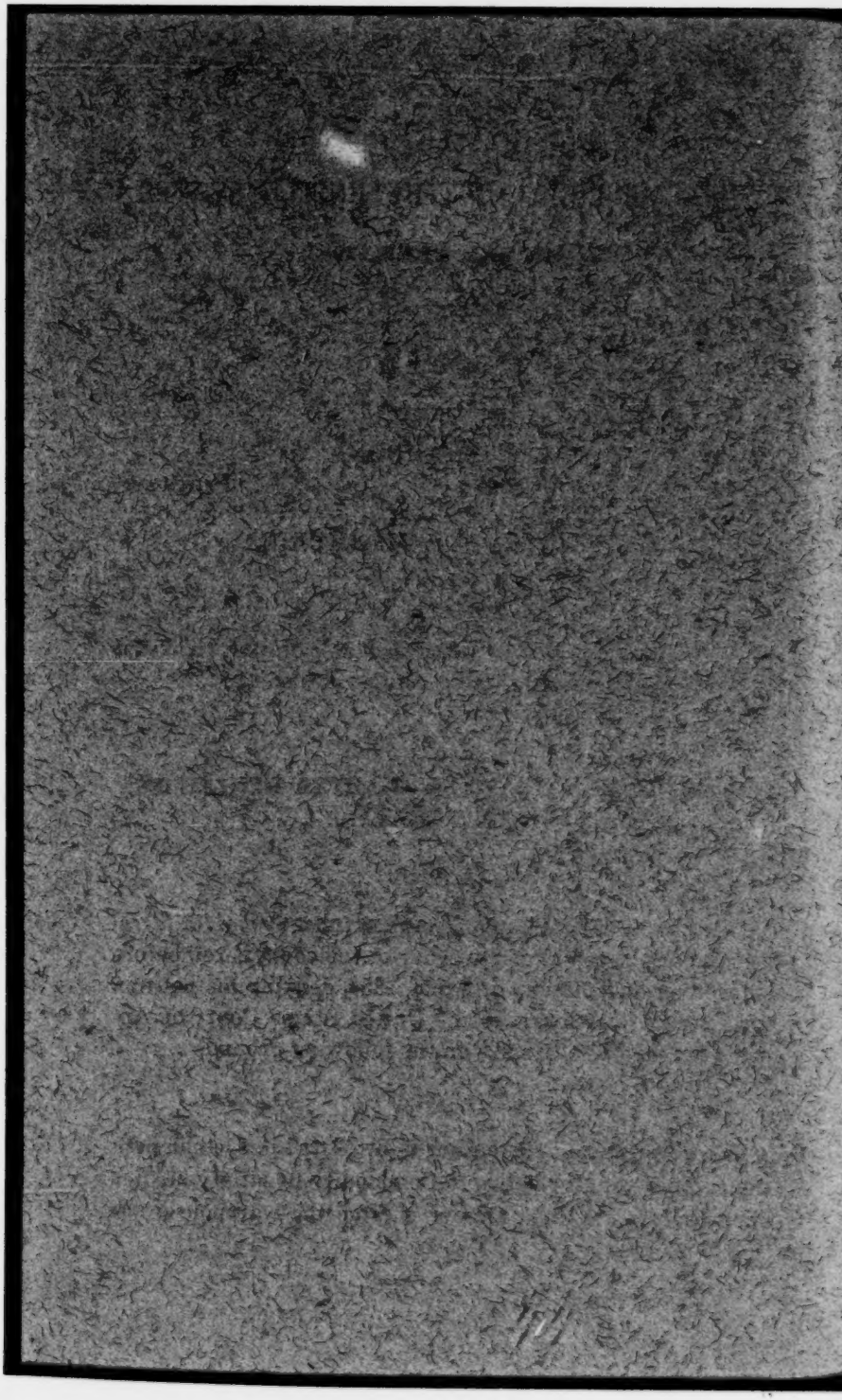

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI

Petitioner, O. L. Shannon, respectfully prays for a rehearing and reversal of the order of the court hereinbefore entered on the 26th day of April, 1954, denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, on the following grounds:

I

The governments contention (Gov. Brief p. 8) that petitioner "did not give notice to Commodity to satisfy his lien upon the grain and to remove it from the warehouse, nor

was an attempt made to turn over a cash balance to Commodity after the satisfaction of any warehouseman's lien," is a mere assumption by the writer of the government's brief and is totally unsupported by the record. Article 5645 (Petition for Writ of Certiorari pp. 5-6) requires only such notice "as is reasonable and possible under the circumstances." This notice could have been oral, and, in fact, oral notice was given, in addition to the written notice, to Mr. Stuart an agent of Commodity (R. p. 278-279).

Also, the Record shows (R. p. 389-394, 435) and government counsel admit (Gov. Brief p. 6) that at the time in question CCC owed Mr. Shannon $41,111.17 storage charges on one bill he had sent them. Under Article 5645, R. C. S. of Texas, Mr. Shannon had a right to apply the *net proceeds,* after paying handling and shipping costs, to the satisfaction of this lien. Out of 41 cars of grain, selling mostly as poor sample grade, he scarcely could have realized enough to satisfy the lien which is admitted by the government (R. p. 106).

The statement of government counsel (Footnote 3, page 7, Gov. Brief) that petitioner was not convicted of stealing or converting "the relatively small amounts of grain damaged or spoiled" is not supported by the Record. We think the Record in this case clearly shows that at least 22,382,069 pounds of grain was lost through the June 4, 1951 flood and other unavoidable deterioration.[1]

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[1] From the Record p. 71 we get these figures:

1 warehouse		57,751 square feet
1 warehouse	100 ft. x 200 ft.	20,000 square feet
1 warehouse	100 ft. x 400 ft.	40,000 square feet
1 warehouse	100 ft. x 260 ft.	26,000 square feet
1 warehouse	100 ft. x 300 ft.	30,000 square feet
Total		173,751 square feet

Rotten Grain (R. pp. 200-228) 1.5 feet deep x 173,751 sq. ft. =260,626 cubic feet. Reduced to bushels, .8 x 260,626 cu. ft. = 208,500 bushels.

This figure of 22,382,069 lbs. destroyed by deterioration approximates the shortage which Mr. Bachmann, a government witness, says existed on June 3, 1951, just prior to the flood (R. p. 487), in amount of 22,456,532 lbs. If, in "reconstructing" his inventories by his "reverse method" (See Appendix "Y", p. 9, Petitioners Supplemental Brief) he started with such a shortage it would be reflected in every "reconstructed inventory." This being true, there was no appreciable shortage on June 3, 1951 as a matter of simple mathematics. In other words 22,456,532—22,382,069 = 74,463 lbs. which sum is less than one car of grain. The above figure does not take into account normal shrinkage, which undoubtedly caused several millions of pounds additional shortages.

Government counsel in their brief contend that the sales in May, June, and July 1951, the periods named in the indictment, were made by Mr. Shannon "when he was cognizant of a serious shortage" (Gov. Brief p. 8). This is not supported by the Record. Mr. Shannon filled all loading orders from CCC until he ran out of grain (R. p. 336). On August 20, 1951, according to the only CCC inventory ever

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Using same method used by Government Witness Mize (R. p. 451) we then multiply the number of bushels by 56 lbs. as follows: 56 lbs. x 208,500 bushels = 11,676,000 lbs. totally destroyed in the flood and thrown out on the ground (R. pp. 196-200) shortly after June 4, 1951.

17% total damage (R. p. 414) on 11,361,400 pounds of milo shipped in 1951 = 1,931,438 lbs. lost.

11.7% total damage to 5,020,400 lbs. of milo and Kaffir shipped in 1951 (R. p. 415) equals 587,386 lbs. lost.

4.2% total damage to 6,605,200 lbs. of milo shipped in 1950 (R. pp. 412-413) = 277,418 lbs. lost.

12.1% total damage to 3,387,000 lbs. of milo and Kaffir shipped (R. p. 413) = 409,827 lbs. lost.

A like set of facts and figures is available on wheat shipped (R. pp. 412-414).

75 cars out of 115 sample grade cars rejected as worthless by CCC (R. p. 437) in 1951 amounted to 75 x 100,000 lbs. (R. pp. 105-106) or 7,500,000 lbs. lost.

Total losses from these figures alone was 22,382,069 lbs.

made, and *long after the periods named in the indictment*, he had *not run out* of grain. On that date he still had 8,367,403 lbs. of milo and 15,696.28 bushels of wheat (R. p. 408).

Consequently, every element necessary under Art. 5645 R. C. S. of Texas is present in this case.

Not only that, but paragraph 10, of the contract (Supp. Record pp. 11-12) provides that the warehouseman shall be liable (civil liability is meant, we think) for deterioration of grain "only until the date he notifies Commodity" that the grain is going out of condition. If there is no civil liability there could be no criminal liability and the selling of such grain to prevent further loss after "reasonable and possible" notice would be a simple compliance with said Art. 5645. There could not, as a matter of law, be any *criminal intent* under such circumstances.

II

The *Uniform Storage Agreement* (Supp. R. p. 11) involved in this case was a *simple contract*, not within the Statute of Frauds, and could be, and was, amended or altered by parole.

This proposition was not mentioned in our original brief, and we bring it up here as an additional point to be considered in connection with our original Point II (Petitioner's Brief pp. 20-39).

III

Where the record shows, as in this case, that shortages charged against the accused were the result of an Act of God and other unavoidable deterioration (See note 1, *supra*), and that the "reverse method," described in our *Supplemental Brief on Petition for Certiorari*, was used to "reconstruct" inventories and it being a mathematical cer-

tainty that the final shortage of grain due to deterioration and shrinkage will follow through and reappear in each "reconstructed inventory," whether there was an actual shortage or not, there is no evidence to support a jury verdict of guilty. In this case, the amount of deterioration from flood and rot is so close to the amount of the "reconstructed inventory" of June 3, 1951, just before the Flood of June 4, as to make immediately apparent the fallacy of such evidence, as pointed out in our Supplemental Brief (See Note 1, *supra*).

As above pointed out, there was only 74,463 lbs. difference between the grain lost by deterioration as reflected by the Record and the "reconstructed inventory" of June 3, 1951 testified to by Mr. Bachmann. If we only use a fraction of one per cent to figure additional shrinkage, there would then be no difference. Then, if we refer to Appendix "X" and Appendix "Y" of Petitioners Supplemental Brief, we can easily see that the shortage due to deterioration is reflected almost to a pound in the June 3rd "reconstructed inventory"; which simply means, as a matter of simple mathematics, *that there was no shortage on June 3, 1951*, and that the total shortage, after June 4, whatever it may have been, was due to flooded and damaged grain. As pointed out above, after June 4 and after notice to CCC, Shannon had a right to sell the grain under Art. 5645 R. C. S. of Texas.

This shortage, when carried through "in reverse" would continue to show up in every "reconstructed inventory" until we got back to some period or other when Mr. Shannon was "long" by approximately 23,000,000 lbs. When that happens *he will appear* merely to be "even with the board" under Mr. Bachmann's method of computation.

It is clear that Mr. Shannon was, therefore, convicted

"without due process of law" in violation of the Fifth Amendment to the Constitution.

Dated the 1st day of May, 1954.

JAMES O. CADE,
Counsel for Petitioner.
KENNETH BOWLIN,
Of Counsel.

I hereby certify that the above petition for rehearing is presented in good faith and not for delay and that said petition is restricted to the grounds above specified.

Dated May 1, 1954.

JAMES O. CADE,
Counsel for Petitioner.

(4804)